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Nos. 809-811

# Supreme Court of the United States

OCTOBER TERM, 1945.

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UNITED STATES, *Petitioner*,

v.

ROBERT MORSS LOVETT

---

UNITED STATES, *Petitioner*,

v.

GOODWIN B. WATSON

---

UNITED STATES, *Petitioner*,

v.

WILLIAM E. DODD, JR.

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

---

## BRIEF FOR RESPONDENTS

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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# Supreme Court of the United States

OCTOBER TERM, 1945.

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No. 809.

UNITED STATES, *Petitioner*,

v.

ROBERT MORSS LOVETT

---

No. 810.

UNITED STATES, *Petitioner*,

v.

GOODWIN B. WATSON

---

No. 811.

UNITED STATES, *Petitioner*,

v.

WILLIAM E. DODD, JR.

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

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## BRIEF FOR RESPONDENTS.

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### OPINIONS BELOW

The four opinions of the Court of Claims (R. 33-48) are not yet officially reported.

## JURISDICTION

The judgments of the Court of Claims were entered on November 5, 1945 (R. 33, 41, 48-49). Petitions for writs of certiorari were filed on February 5, 1946, and were granted on March 25, 1946 (R. 49). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

## QUESTIONS PRESENTED

The Petition for Certiorari states the Questions Presented as follows:

1. Whether Section 304 of the Urgent Deficiency Appropriation Act, 1943, 57 Stat. 431, 450, *infra*, undertook to terminate the respondents' sevices, and not merely to prohibit disbursing agencies from paying their salaries.

2. If so, whether Section 304 is constitutional.

3. Whether, in view of Section 304 and the failure of the President to appoint respondents thereunder, the United States incurred a legal obligation to pay respondents for services rendered after November 15, 1943.

4. Was the Court of Claims presented with justiciable controversies.

## STATUTE INVOLVED

Section 304 of the Urgent Deficiency Appropriation Act, 1943, 57 Stat. 431, 450, provides as follows:

> SEC. 304. No part of any appropriation, allocation, or fund (1) which is made available under or pursuant to this Act, or (2) which is now, or which is hereafter made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States shall be used, after November 15, 1943, to pay any part of the salary, or other compensation for the personal services, of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett, unless prior to such date such person has been appointed by

the President, by and with the advice and consent of the Senate: *Provided*, That this section shall not operate to deprive any such person of payment for leaves of absence or salary, or of any refund or reimbursement, which have accrued prior to November 15, 1943: *Provided further*, That this section shall not operate to deprive any such person of payment for services performed as a member of a jury or as a member of the armed forces of the United States nor any benefit, pension, or emolument resulting therefrom.

## STATEMENT

The facts with respect to the three respondents were stipulated, and are set out in the Findings of the court below, which fully accepted the stipulated facts (R. 19-33). In addition, there are a number of other facts, all of them the proper subject of judicial notice since they relate to the Congressional proceedings on Section 304, which are not contained in the Findings. They are equally important in any adequate appraisal of the constitutional issue here involved.

### a. The Respondents

The three respondents in these cases are the three persons named in Section 304, *supra*, p. 2. Each respondent, alleging that Section 304 is unconstitutional, brought suit to recover salary for work performed by him for the United States after November 15, 1943. Since essentially the same questions are raised in each of the three cases, they were briefed and argued together below, and are being similarly treated in this Court. The basic facts revealed by the Findings with respect to each of the respondents are as follows:

#### Robert Morss Lovett

Respondent Lovett was appointed by the Secretary of the Interior to be Executive Assistant to the Governor of the Virgin Islands on August 26, 1943, and took the oath

of office and entered on duty on October 12, 1943 (R. 19). He continued in that office until March 13, 1944, when he resigned (*ibid.*). Immediately prior to his appointment as Executive Assistant he had served as Government Secretary of the Virgin Islands, an office to which the President had appointed him on April 28, 1939 (*ibid.*).

Respondent Lovett received compensation in due course for his services up to November 15, 1943. From that time until he resigned on March 13, 1944, he received no compensation (R. 23-24). The reason is revealed by the Findings. On November 23, 1943, the Commissioner of Finance of the Virgin Islands (the officer authorized to certify the payment of respondent's salary) wrote to the Secretary of the Interior stating that in view of Section 304, he would not certify for payment the salary of respondent after November 15, 1943 (R. 22).

On November 26, 1943, the Secretary of the Interior wrote respondent, requesting that he continue in the office of Executive Assistant. The letter stated (R. 22-23):

> I wish to repeat the request that you continue in the office of Executive Assistant to the Governor. Funds may not be available to pay your salary until the unconstitutional prohibition of the Urgent Deficiencies Act is declared invalid by the courts. I am confident, however, that the prohibition will be so adjudged, and a principle fundamental to democratic government will be upheld.
>
> In no case are you to consider yourself discharged. You will continue to perform the duties of your office and to exercise all the authority conferred upon you by law.

And on November 29, 1943, upon receipt of the letter from the Commissioner of Finance, the Secretary of the Interior again wrote requesting respondent to continue in the Office of Executive Assistant (R. 23). Respondent in fact did continue in that office until his resignation on March 13, 1944 (R. 19-20). His demand that he be paid for his services has been refused (R. 23). The amount of money

which has been withheld from him solely because of Section 304 is $1,936.40 (R. 24). That is the amount which he seeks to recover in this proceeding.

GOODWIN B. WATSON:

Respondent Watson was appointed by the Federal Communications Commissions to be Chief of the Analysis Division, Foreign Broadcast Intelligence Service, on November 16, 1941 (R. 24). He took the oath of office and entered on his duties on the same day, and continued in active duty in that office through November 21, 1943 (*ibid.*). On May 2, 1944, he resigned, and his resignation was accepted on May 3, 1944, effective on May 21, 1944 (R. 24-25).

Respondent Watson, like Dr. Lovett, received compensation in due course for his services until November 15, 1943. From that time, and up to the time when he ceased the active performance of his duties on November 21, 1943, he received no compensation (R. 29). Again, as in the case of Dr. Lovett, the Findings give the reason. On November 22, 1943, the Secretary of the Federal Communications Commission, who is the certifying officer of the Commission, wrote to respondent as follows (R. 28):

> The Commission's records show that you have been on active duty with the Federal Communications Commission from November 7th through November 21st. Since the position which you hold pays a base salary of $6500 per annum, your compensation for this pay period, with overtime, would ordinarily be $297.01. However, in your case there is a provision of law which makes it impossible to pay you the full sum to which you would be otherwise be entitled.

Then, after quoting Section 304 (*supra*, pp. 2-3), the letter continued:

> Because of this provision, it is possible to compensate you only for your services from November 7th through

> November 15, 1943 and your compensation for this period with overtime is $178.21. Accordingly, after adjustment of tax deduction $23.60 and retirement deduction $8.13, there is enclosed a check for $146.68.

Respondent was given no instructions by the Commission to cease working on November 15, 1943; in fact the Commission permitted him to continue in his regular work for the period for which he now seeks payment—from November 15 to November 21, 1943 (R. 29). His demand that he be paid for those services has been refused (*ibid.*). The amount of money which has been withheld from him solely because of Section 304, is $101.78 (*ibid.*). He seeks recovery of that amount in this proceeding.

4

WILLIAM E. DODD, JR.

Respondent Dodd is in a position very similar to that of Dr. Watson. He was appointed by the Federal Communications Commission to be Editorial Assistant, Foreign Broadcast Intelligence Service, on December 1, 1941 (R. 29). He took the oath of office and entered on his duties on the same day (*ibid.*). He continued in active duty in that office until December 22, 1942, when he was appointed by the Commission to be Assistant News Editor, Foreign Broadcast Intelligence Service, and he continued on active duty in that office until November 21, 1943 (*ibid.*). From November 21, 1943 to the date of the Stipulation, respondent has been on a leave-without-pay status (R. 30).

Like Dr. Watson, respondent Dodd received compensation for his services in due course until November 15, 1943 and was not paid thereafter (R. 32). On November 22, 1943, he likewise received a letter from the Secretary of the Federal Communications Commission, which is identical, *mutatis mutandis*, with that received by Dr. Watson (R. 32). Respondent Dodd seeks recovery in this proceeding of $59.83 (R. 33).

**b. The Statute**

Section 304 of the Urgent Deficiency Appropriation Act of 1943 is, so far as we know, the first statute in our history in which Congress has purported to ban certain named individuals from ever again holding a gainful position with their government. We believe, of course, that it is unconstitutional. But we also believe that no judgment on the constitutional issue can be made without an understanding of its background and the method of its enactment.

The House of Representatives, where Section 304 originated, had long been irked because, as the House saw it, the Executive branch had taken inadequate action against "subversives" in the Government service. Section 304 is the culmination of that irritation. By the device of a "rider" on a vital appropriation bill, the House succeeded in forcing unwilling acquiescence in its plan from the Senate. The President, although he believed Section 304 to be invalid, and not binding upon him, also signed the bill because of the vital appropriation which it contained. It will be helpful in presenting the argument if we trace, as briefly as possible, the origins and nature of the dispute between the House and the Executive branch, the manner in which these three plaintiffs became involved in it, the action taken by the House with respect to each plaintiff, and the final drafting and passage of Section 304.

*The origin and nature of the dispute*—In May, 1938 the House of Representatives created a Committee on Un-American Activities—better known as the Dies Committee (H. Res. 282, *Cong. Rec.*, Vol. 83, pp. 7568-7587). The announced impetus for the Committee was a need for investigating Nazi and Fascist activities (see *Cong. Rec.*, Vol. 83, pp. 7568-7570), but its emphasis soon shifted to the investigation of Communists and "left-wing" groups. See, *e. g.*, its early reports: H. Rep. No. 1, 77th Cong., 1st Sess.; H. Rep. No. 2748, 77th Cong., 2d Sess., *passim*.

But the Dies Committee was not the only manifestation of the interest of Congress in Communism and Communists.

particularly those claimed to be in the Federal service. In late 1939 the Hatch Act was passed, Section 9A of which stated (Act of August 2, 1939, 53 Stat. 1148, 1149):

> (1) It shall be unlawful for any person employed in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any Act of Congress, to have membership in any political party or organization which advocates the overthrow of our Constitutional form of government in the United States.
>
> (2) Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any Act of Congress for such position or office shall be used to pay the compensation of such person.

In June 1940 a similar limitation was incorporated in the Emergency Relief Appropriation Act of 1941 (Sections 15(f), 17(b), 54 Stat. 611), and in early 1941, Congress began the practice of including in all appropriation bills a similar prohibition, together with criminal penalties for its violation.[1]

The Executive Branch—primarily, of course, the Department of Justice—took appropriate cognizance of these acts. Initially, under the Hatch Act, complaints in this respect about any Federal employee were referred to the agency in which he worked, and the Federal Bureau of Investigation was assigned to make an investigation and report only upon the request of that agency (See H. Doc. 833, 77th Cong., 2d Sess., pp. 6-7). In June 1941, however, a special appropria-

[1] See, *e.g.*, Independent Offices Appropriation Act, 55 Stat. 92, Sec. 5; Appropriation for State, Commerce, Justice and the Judiciary, 55 Stat. 265, Sec. 504; Appropriation for the Department of Interior, 55 Stat. 303, Sec. 7; Appropriation for the War Department, 55 Stat. 366, Sec. 10; Appropriation for the Department of Agriculture, 55 Stat. 408, Sec. 3; Legislative Branch Appropriation Act, 55 Stat. 446, Sec. 5; Appropriation for Department of Labor, 55 Stat. 466, Sec. 704.

tion was made for the purpose of these investigations; the Department of Justice Appropriation Act provided (55 Stat. 292):

> * * * at least $100,000 shall be available exclusively to investigate the employees of every department, agency and independent establishment of the Federal Government who are members of subversive organizations or advocate the overthrow of the Federal Government, and report its findings to Congress.

And in October 1941 the Department of Justice changed its investigation policy. The Attorney General advised all agencies that thereafter the F. B. I. would "institute investigations of this type, without notice to the head of the employing department or agency, whenever the F. B. I. receives information or complaints showing reasonable grounds for taking action" (H. Doc. 583, *supra*, pp. 9-10). Moreover, the widest scope was given to the legislative mandate. Literally, Congress had directed investigation only of employees who were members of "subversive" organizations; but in order that the investigation should be fully adequate, investigations were also made of employees who were members of organizations not subversive, but as to which the Department had reason to suspect Communist backgrounds or Communist connections (*id.* pp. 12-13).

The results of these F. B. I. investigations were (and are now, since the work has not ceased), submitted to the department or agency in which the employee worked. The F. B. I. report contained no conclusions or recommendations; administrative action to be taken was, and is, in the hands of the head of the department or agency involved (*id.* p. 11).[2]

---

[2] In April 1942, the Attorney General created a committee known as the Interdepartmental Committee, in order that there might be some agency to correlate the actions taken by the various departments or agencies on the F. B. I. reports and to make recommendations in other ways to assist in carrying out the mandate of the Department of Justice Appropriation Acts (*id.* pp. 18-28).

Under this first appropriation of $100,000, the F. B. I. dealt with complaints against some 4,579 Federal employees up to August 22, 1942. Of these, about 1,100 were supplied by the Chairman of the Dies Committee. By the same date, the F. B. I. had completed and forwarded to the appropriate agency or department, 2,095 reports, and had been informed of the disposition of the cases by the employing agency in 1,725 cases. From all of this, 36 persons were reported separated from the Federal service—only 2 of them being from the Dies list. There were 13 more who were reprimanded or transferred from national defense employment (*id.* pp. 17-18).

The Attorney General, reporting to Congress as required by the Act, was strongly critical of such wholesale investigations (*id.* pp. 1-5). He and the Interdepartmental Committee agreed that "results achieved have been utterly disproportionate to resources expended" (*id.* p. 4). A large proportion of the complaints, he stated, were "clearly unfounded", and "should never have been submitted for investigation in the first instance", and "this is conspicuously true of the list submitted by Congressman Dies" (*id.* pp. 3-4). After pointing out that the Dies list was largely based upon the appearance of the subject's name on the "active indices" of various organizations, he quoted the Interdepartmental Committee as stating: "In all but a small residuum of the cases, the lead provided by the 'active indices' of front organizations proved to be utterly worthless" (*id.* p. 4). The Attorney General added (*ibid.*):

> Moreover, it is now clear that the objective test of membership in a "front" organization is thoroughly unsatisfactory. Appraisal of an individual's political opinions and points of view is difficult enough at best. The objective test fails completely where "subversive" character is so imperfectly indicated and where the purposes of the organization are so stated as to make membership in most circumstances consistent with loyalty.

Before this report had been received by Congress, however, the Department of Justice Appropriation Act for 1943 had been enacted (56 Stat. 468, 482), and an additional $200,000 had been appropriated. The further investigations, however, revealed nothing to change the Attorney General's former conclusion. The reports of the F. B. I. for the first and second quarters of the fiscal year 1943 (H. Docs. 51, 162, 78th Cong., 1st Sess.) reveal that by March 31, 1943, the number of employees complained of had risen to 4,948, the number of completed investigations had risen to 2,303 and the department or agency had reported the results to the F. B. I. in 2,118 instances. Of this latter number, the employing agencies reported 43 separations from the Federal Service, and 39 cases of other administrative action (H. Doc. 162, 78th Cong., 1st Sess., p. 5). From the 1,100 names in the Dies list, the examinations of which had been completed, there were 4 persons separated, and 2 cases of other administrative action (*id.* p. 4).

*The respondents' connection with the dispute.*—On February 1, 1943, Mr. Dies made a long speech in the House (*Cong. Rec.*, Vol. 89, pp. 474-486), attacking 39 named individuals in various government departments, including the three respondents here, as "irresponsible, unrepresentative, crackpot, radical bureaucrats" (*id.* p. 479). These individuals had not been the subject of any action by the Dies Committee itself (*id.* p. 705); the charges were only those of Mr. Dies personally. At the end of his speech he said (*id.* p. 486):

> Congress does have a remedy. If we cannot obtain relief from one source, then we as Members can say, "If you do not get rid of these people we will refuse to appropriate money for their salaries." * * * I submit it is now in order that the Committee on Appropriations take immediate and vigorous steps to eliminate these people from public office.

Four days later, on February 5, 1944, Mr. Hendricks of Florida offered an amendment to the Treasury-Post Office

Appropriation Bill (H. R. 1648) providing: "no part of any appropriation contained in this Act shall be used to pay the compensation of" the 39 individuals attacked by Mr. Dies (*Cong. Rec.*, Vol. 89, p. 645). During debate on the Hendricks amendment, many Congressmen made known their opposition to such a procedure, and others objected to any action taken with so little knowledge of the facts. See *id.* pp. 647-653. Moreover, it was pointed out that but one of the 39—Mr. William Pickens—was employed by either the Treasury Department or the Post Office, and that consequently the amendment was pointless as to the other 38. The House finally rejected the Hendricks amendment (*id.* p. 655), but Mr. Hendricks immediately offered another amendment which contained only the name of Mr. Pickens, and this was adopted (*id.* p. 656).

During the next few days, however, various members of the House discovered that Mr. Pickens was a Negro—the only one among the 39—and that unwittingly they had appeared to discriminate against him on racial grounds (see, *e. g.*, *id.* p. 708). On February 8, during further debate on the bill, it became apparent that many who had voted for the Pickens amendment were anxious to change their votes (*id.* pp. 697-715). The formula was supplied by the Chairman of the Committee on Appropriations, Mr. Cannon, of Missouri. He announced that he would introduce a resolution creating a special subcommittee of the Committee on Appropriations to hear charges against any Government employee, and, if the charges were sustained, to take immediate action separating him from the payroll (*id.* pp. 709-710). This resolution (H. Res. 105) was reported to the House on February 9 (*Cong. Rec.*, Vol. 89, p. 734), and was agreed to without a record vote (*id.* p. 742). Then the Pickens amendment was rejected (*id.* pp. 756-757).

House Resolution 105 authorized and directed the Committee on Appropriations, acting through a special subcommittee thereof appointed for the purpose—

> to examine into any and all allegations or charges that certain persons in the employ of the several executive departments and other executive agencies are unfit to continue in such employment by reason of their present association or membership or past association or membership in or with organizations whose aims or purposes are or have been subversive to the Government of the United States.

The Committee was further authorized to incorporate in any appropriate bill any legislation approved by it as a result of the resolution.

*The proceedings against these respondents in the House.* —The subcommittee appointed under the resolution was headed by Mr. John H. Kerr of North Carolina, and became known as the Kerr Committee. It apparently met on March 23, 1943, and adopted rules of procedure (See *Cong. Rec.*, 78th Cong., 1st Sess., Appendix, p. 7962), but it did not hold its first hearing until April 9 (R. 20-21).

Each of the present respondents appeared before the Kerr Committee. The letter from the Committee to Dr. Watson (stated to be an "invitation", R. 26) is included in the Findings (*ibid.*). It is dated April 7, was presumably received April 8, and announces a meeting on his case on April 9.[3] After stating that the Kerr Committee had before it the files of the Dies Committee, the Civil Service Commission, the F. B. I. and the Federal Communications Commission "relative to your qualifications and suitability as a federal employee", the letter continued:

> The committee will examine these files beginning Friday, April 9, 1943, at 10:00 A. M. and you are instructed to appear at room 449 Old House Office Building at such time when opportunity will be afforded you to answer these charges and interrogations by the Committee.
>
> A statement and list of the charges preferred against you before this committee by the Committee on

[3] Respondent Lovett was summoned to a meeting on April 15 by a letter handed him on April 14 (R. 21).

> Un-American Activities, House of Representatives, is immediately available for your inspection at the office of this committee.

Respondents Lovett and Watson did not attempt, in the few hours which intervened between their "invitations" and their session with the Kerr Committee, to see the charges against them (R. 21, 27). Respondent Dodd did, and was told by the Clerk of the Kerr Committee that it had formulated no charges against him (R. 30).

All of the proceedings of the Kerr Committee were in executive—*i.e.*, secret—session, and each of the respondents appeared alone before it (R. 21, 27, 30-31). The first person summoned (not one of the respondents) appeared accompanied by the general counsel of the agency where he worked—the Federal Communications Commission. The latter requested permission to appear as an observer, but withdrew when he was told that the subcommittee had decided to hold its hearings "without any persons other than the subcommittee, its staff and the witness being present" (R. 27, 30-31). The attempt by the Solicitor of the Department of the Interior to attend the hearings with Dr. Lovett met a similar response (R. 21).

The proceedings of the Kerr Committee during its interrogation of the respondents were printed by the Committee (*Hearings before the Special Subcommittee of the Committee on Appropriations, House of Representatives, 78th Cong., 1st Sess., Acting under H. R. 105*, cited hereafter as Kerr Hearings). This pamphlet was made available to members of Congress only about June 30, 1943, when Senate pressure for information compelled abandonment to this extent of the policy of secrecy.[4] Even now, of course, only

[4] See *Cong. Rec.*, Vol. 89, p. 7008. It appeared that the Kerr Committee had originally decided that it was to serve as a sort of jury, and report to Congress only its conclusions as contained in its report and its recommendations. See Keefe, a member of the Committee, *Cong. Rec.*, Vol. 89, p. 4600. Even the Hearings which were printed are, of course, but a small portion of the material before the Subcommittee. See R. 21, 27, 30.

the five members of the Kerr Committee know the evidence upon which that Committee made its recommendations; respondents and the rest of Congress are alike in ignorance. Everything was and is secret except the "hearings", and the "charges" against two of the three respondents (Kerr Hearings, *supra*, Appendices A, B. Dodd was apparently never "charged" with anything). Mr. Keefe, a member of the Kerr Committee, told the House that "much" of the material was such that they had to assure the F. B. I. and the Army and Navy Intelligence services that the Subcommittee would not make it public (*Cong. Rec.*, Vol. 89, p. 4600). Apparently the same arrangement was made with the Dies Committee. (See R. 21, 27, 30.)

*The reports of the Kerr Committee.*—On April 21, 1943, the Kerr Committee submitted to the Committee on Appropriations, and also made public, its first report (H. Rep. No. 448, 78th Cong., 1st Sess., pp. 3-7). The report stated (*id.* p. 4) that it had dealt with the investigations "as in the nature of an inquest of office" with the ultimate object of purging the public service of anyone found guilty of "subversive activity". Noting that "subversive activity" had not been defined by Congress or by the courts, the Kerr Committee had formulated its own definition (*id.* p. 5):

> Subversive activity in this country derives from conduct intentionally destructive of or inimical to the Government of the United States—that which seeks to undermine its institutions; or to distort its functions, or to impede its projects, or to lessen its efforts, the ultimate end being to overturn it all. Such activity may be open and direct as by effort to overthrow, or subtle and indirect as by sabotage.

As will appear from the argument below, we believe that nothing in this case turns on the findings of the Kerr Committee. Its investigation might have been generated by, and concerned itself with, the belief that atheists permeated the Government, or that members of the Government service entertained an attitude on divorce which was objec-

tionable, or were inclined to drive too fast. We believe that irrespective of the basis for its action, Congress has here undertaken to assert a power denied it by the Constitution. Our analysis of the findings with respect to these respondents, therefore, is for the convenience of the Court, and is in no sense an argument that the decision should in any degree be dependent upon those facts.

The first report of the Kerr Committee "found" that Dr. Watson and Mr. Dodd had engaged in "subversive activity within the definition adopted by the Committee" (H. Rep. No. 448, *supra*, pp. 5-7). Dr. Watson, the Subcommittee stated, admitted "association or affiliation" with 12 organizations, which it listed. None of the 12 organizations, the Subcommittee admitted, had been adjudged "subversive" by the courts or by Congress (*id.* p. 5). The Subcommittee asserted, however, that "a number of" the organizations had been "designated by the Department of Justice as 'front organizations' and other as 'questionable' " (*ibid.*), and in the next paragraph referred to all of the organizations as "associations whose aims and purposes were subversive to this Government" (*id.* p. 6).

Conceivably, the Subcommittee had information, including information as to Department of Justice findings with respect to these organizations, which has never been revealed to Congress, to the respondents, or to the public. But unless this be so, the Subcommittee's statement is inconsistent with the Department's position. The Attorney General, at least, had told the Subcommittee only two months earlier that these so-called "front" organizations were "*not* regarded as subversive within the legislative mandate" of the appropriation acts (see letter dated March 8, 1943, from the Attorney General to Chairman Kerr, Appendix, *infra*, pp. i-iii, italics ours), and the F. B. I. and the Interdepartmental Committee had made similar reports to Congress (H. Doc. No. 833, 77th Cong., 2d Sess., pp. 12, 19-20). The Attorney General had directly denied that the associations had "aims and purposes" which were subver-

sive; on the contrary, he had stated that "the purposes of [these organizations] are so stated as to make membership in most circumstances consistent with loyalty" (*id.* p. 4). The Interdepartmental Committee had described them by stating that "generally they professed the highest patriotism. Frequently their platforms or programs were calculated to enlist the adherence and support of large numbers of people who would not consciously have had anything to do with an organization inspired or dominated by Communists, Nazis, or Fascists" (*id.* p. 19). Finally, the Attorney General had specifically warned Congress, on the basis of full F. B. I. experience, that no weight whatever could be attributed to association or affiliation with them (*ibid.*). This, too, is flatly contrary to the conclusion of the Subcommittee that "membership and association * * * with the organizations mentioned * * * constitute subversive activity" (H. Rep. No. 448, *supra*, p. 6).

Of the 12 organizations listed for Dr. Watson, only 3 appeared in the Attorney General's letter to the Committee listing all those known to the Department of Justice (Appendix, *infra*, pp. i-iii), although this fact was never revealed by the Subcommittee. So far as the other 9 are concerned, there is no way of knowing upon what basis they were found "subversive" (H. Rep. No. 448, *supra*, pp. 5, 6). The Attorney General, at least, did not so regard them any more than, presumably, he did the dozens of other organizations with which Dr. Watson admitted much closer affiliation (*Report by the Federal Communications Commission in the Matter of Goodwin Watson, Frederick L. Schuman and William E. Dodd, Jr.*, April 26, 1943, pp. 23-24. Reprinted in *Cong. Rec.*, Vol. 89, pp. 4588-4591.). Again, it is conceivable that the Subcommittee had knowledge of which all the rest of Congress and the respondents are unaware, but it is certainly difficult, in the light of the Attorney General's letter, to know what it could be.

In any event, Dr. Watson was convicted because, as the Subcommittee stated, this "association or affiliation", the

writing of articles for several magazines (not named) "*reputedly* controlled by subversive interests" (italics ours), and Dr. Watson's views and philosophies expressed in various writings, "constitute subversive activity". Dr. Watson was therefore declared unfit "to continue in Government employment" (H. Rep. No. 448, *supra*, p. 6).

The Subcommittee's findings as to Mr. Dodd were somewhat different (*id.* pp. 6-7). He had, at one time, been a member of two so-called "front organizations". The same comments are applicable to this finding as have already been made with respect to the similar findings as to Dr. Watson.[5] In addition, as to one of these organizations—the Washington Bookshop—the Subcommittee failed to state that the Department of Justice had specifically warned (Appendix, pp. i-iii) that the list it had furnished the Subcommittee did *not* apply to "mere patrons or subscribers" of the Bookshop, which was Mr. Dodd's only connection with it (Kerr Hearings, pp. 124-125). Second, the Subcommittee found that Mr. Dodd had "association with Communists" because he had allowed a cocktail party for Harry Bridges to be held in his apartment "although he knew deportation charges were pending against Mr. Bridges (H. Rep. No. 448, *supra*, p. 6). Finally, the Subcommittee found that he had made a statement "quoted in The World Hails The 20th Anniversary of The Soviet Union" (*id.* p. 7). All this, the Subcommittee found to be "subversive activity", and it concluded that Mr. Dodd was therefore unfit to continue in Government employment.

On April 26, 1943, the Federal Communications Commission filed a full, 26-page Report on the Kerr Committee conclusions. *Report by the Federal Communications Commission in the Matter of Goodwin Watson, Frederick L. Schu-*

[5] The Subcommittee also referred to "a long list of organizations under whose auspices he had lectured or with whom he had been associated" (H. Rep. No. 448, *supra*, p. 7), but, except by implication, did not indicate anything in this which was subject to criticism.

*man and William E. Dodd, Jr.* (reprinted in *Cong. Rec.*, Vol. 89, pp. 4588-4591). The Commission not only fully analyzed the Committee's accusations, but it set out a summary of the great body of affirmative evidence of loyalty of both Dr. Watson and Mr. Dodd, including the high praise which their work at the Commission had received (none of which the Kerr Committee had mentioned). Upon all the evidence the Commission concluded: "We find no basis or reason for the dismissal of Watson, Schuman[6] or Dodd from employment by the Federal Communications Commission" (*id.* p. 26).

The second report of the Subcommittee was made on May 14, 1943, and dealt with three members of the Department of the Interior, including respondent Lovett (H. Rep. No. 448, *supra*, pp. 8-14). Dr. Lovett, the Subcommittee found, had admitted "membership or association or affiliation" with six organizations which the Subcommittee stated were "found to be within the scope of the mandate" of the Department of Justice Appropriation Acts (*id.* p. 9). This "finding" as to these organizations—a finding which later in the report the Committee attributes to the Department of Justice—is again a misrepresentation of the actual position of the Department of Justice. The letter from the Attorney General had plainly stated that the organizations to which the Committee referred were "not regarded as subversive within the meaning of the legislative mandate" (Appendix, *infra*, pp. i-iii)—although Congress, of course, did not know of the Attorney General's letter. Despite this fact, however, and despite the Attorney General's warning against reliance upon such evidence (*supra*, p. 10), the Subcommittee found that Dr. Lovett was "unfit to continue" in the employment of the United States Government (H. Rep. No. 448, *supra*, p. 12). The strong appeal from the Secretary of the Interior for the retention of Dr. Lovett, which the Subcommittee acknowledged, was rejected (*ibid.*).

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[6] Mr. Schuman had been investigated and acquitted by the Kerr Committee (H. Rep. No. 448, *supra*, p. 6).

The two other individuals from the Department of the Interior who were discussed in the report were acquitted (*id.*, pp. 12-14).

*Legislative action on Section 304.*—The full Committee on Appropriations made no real review of its Subcommittee's findings, at least of those as to Dr. Lovett, for on May 14, 1943, the same day that the Subcommittee made its second report, the full Committee reported identical conclusions to the House (H. Rep. No. 448, *supra*, pp. 1-2). The report stated that the Committee had directed the offering of the following amendment to the Urgent Deficiency Appropriation Bill, 1943 (H. R. 2714):

> SEC. 304. No part of any appropriation, allocation, or fund (1) which is made available under or pursuant to this Act, or (2) which is now, or which is hereafter made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States, shall be used to pay any part of the salary, or other compensation for the personal services of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett: *Provided*, That this section shall not operate to deprive any such person of payment for leaves of absence or salary, or of any refund or reimbursement, which have accrued prior to the date of the enactment of this Act.

The Urgent Deficiency Appropriation Bill, 1943, was also reported to the House on May 14 (H. Rep. No. 447, 78th Cong., 1st Sess.), and controversy immediately began on the rider. After several days of debate, in which the rider was vigorously attacked as both unconstitutional and unwise (see *Cong. Rec.*, Vol. 89, pp. 4482-4487, 4546-4556, 4581-4605), it passed the House by a vote of 318 to 62 (*id.*, p. 4605).[7]

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[7] Prior to its adoption by the House on this occasion, it was amended by the addition of the second proviso which it now contains, exempting from its prohibition amounts earned for jury duty or service in the armed forces (*Cong. Rec.*, Vol. 89, p. 4604).

Originally, the rider got very short shrift in the Senate. The Senate Appropriation Committee, without discussion, voted an amendment eliminating the rider (S. Rep. No. 264, 78th Cong., 1st Sess., p. 5), and its action was sustained by the Senate (*Cong. Rec.*, Vol. 89, p. 5024).

The first conference report, on June 1, left the issue still in disagreement (H. Rep. No. 514, 78th Cong., 1st Sess.). On June 8, the House, without a record vote, agreed to a motion to insist on its disagreement with the Senate amendment (*Cong. Rec.*, Vol. 89, pp. 5510, 5517). But the Senate was even more emphatic; on June 10, after a debate in which many Senators, including Senator McKellar, the conference committee chairman, joined in denouncing the bill as unconstitutional, arbitrary, unfair and unwise, the Senate voted unanimously—69 to 0—to insist on its amendment (*id.* pp. 5603-5606).

Despite this unqualified expression of the Senate's views, in the next conference report (H. Rep. No. 593, 78th Cong., 1st Sess.) the Senate conferees had agreed to the rider. The House approved the report on the same day without a record vote (*Cong. Rec.*, Vol. 89, pp. 6369-6370). The Senate, however, stuck to its guns. Senator McKellar explained for the conferees that the bill contained many appropriations "essential to the prosecution of the war", that the House conferees "have refused to agree to any deficiency appropriation bill which does not contain this provision", that it was "hoped that the Government will continue to employ these men for a while, anyway, so that they may bring suit for their salaries and thus raise the [constitutional] question", and that consequently they had agreed with the House even though "the majority of our [conference] committee do not believe that under the Constitution Congress has the right to get rid of employees in that way, even after full hearings" (*id.* pp. 6407-6408). Despite Senator McKellar's plea, and after full debate, the conference report was rejected, 52 to 17 (*id.* pp. 6407-6416).

Five days later, on June 28, the conferees again reported (H. Rep. No. 607, 78th Cong., 1st Sess.). Section 304 had been modified to its present form; as the report stated, it was changed "so as to prohibit the use of Federal funds for the employment [of Lovett, Watson and Dodd] after November 15, 1943, unless such persons, prior to that date, have been appointed by the President by and with the advice and consent of the Senate" (*id.* p. 3).

The compromise plan was first considered by the Senate early on June 29, 1943. Senator Barkley argued strongly against the constitutionality of the measure (*Cong. Rec.* Vol. 89, p. 6693-6694). On the other side, Senator McKellar told the Senate that the House conferees had "stated that they would stand right where they were" (*id.* p. 6694), and that the Senate had to decide "whether we want to stand where we are and not have any bill" (*ibid.*). The conference report was, however, rejected, by a vote of 43 to 31 (*id.* p. 6694). The Senate was beginning to weaken before the determination of the House.

Later, on the same day—June 29, 1943—the conferees filed another report, substantially identical with that upon which the Senate had just voted (H. Rep. No. 618, 78th Cong., 1st Sess.). For a second time that day the Senate considered it, and it was again rejected, this time by the very narrow margin of 35 to 32. Senator McKellar again emphasized that in his judgment it was a question of balancing the salary of three people against the salary of several hundred thousand policemen, teachers and Congressional employees (Cong. Rec., Vol. 89, pp. 6729-6738). After the vote rejecting the report, Senator McKellar attempted to withdraw as a conferee, stating (*id.* p. 6738):

> I am sorry for the page boys. I wish to tell them that I did everything I could for them, and for the boys over in the House, for the school teachers, the policemen, and thousands of other employees throughout the country, who not only will not receive any increase in salary, but will not receive their salaries. I am very

> sorry. I meant no harm in being persistent. I greatly regret that the Senate has not stood by the Senate conferees.

On June 30, the House rejected a motion that it recede from its position by a vote of 301 to 71 (*id.* pp. 6868-6869).

With this renewed expression of the intransigent attitude of the House before them, the conferees brought in another report, again substantially identical with the two prior ones (H. Rep. 661, 78th Cong., 1st Sess.). The Senate considered it on July 2 (*Cong. Rec.*, Vol. 89, pp. 7003-7004). On this occasion there was available to the Senate, for the first time, the transcript of the Hearings of the Kerr Committee. (See *Cong. Rec.*, Vol. 89, p. 7008), so this time Senator McKellar based his plea for Senate approval of the conference report on the "facts"—a bitter denunciation of the "three Communists" (*id.* pp. 7006-7008). (No one before or since, so far as we are aware, has asserted that the respondents are Communists.) He stated (p. 7008):

> Let me say to the Senate that the pages are as fine a group of young boys as I have ever known. Even if only one of them was involved I would vote to give him his salary, the three Communists to the contrary notwithstanding; constitutional questions notwithstanding.

The Senate finally yielded, and voted 48 to 32 to sustain the conference report (*id.* p. 7014). The House approved it on the following day (*id.* pp. 7126-7135).

The President, although he believed that the rider—Section 304—was unconstitutional, signed the bill on July 12, 1943. As soon as Congress reconvened, the President sent to Congress a message dealing with the bill (H. Doc. No. 264, 78th Cong., 1st Sess.), in which he stated that he had "reluctantly" signed it, and then only "because it appropriates funds which were essential to carry on the activities of almost every agency of the Government during the recess of the Congress". The President added: "The Senate yielded, as I have been forced to yield, to avoid delaying

our conduct of the war. But I cannot so yield without placing on record any view that this provision is not only unwise and discriminatory, but unconstitutional."

### c. The Present Position of the Respondents

The President, believing, as he had informed Congress, that the rider was unconstitutional, and not binding upon him (H. Doc. No. 264, *supra*), took no action under it. Presidential appointments of Messrs. Lovett, Watson and Dodd under the proviso in Section 304 would have been wholly inconsistent with the President's publicly stated belief that the law was ineffective for any purpose.

Congress has purported, therefore, by this rider, to put these three respondents in the position that they may never again have gainful employment by the United States (except as a juror or a soldier). The ban is categorical—no part of any "appropriation, allocation or fund" under the 1943 Urgent Deficiency Act or "which is now, or which is hereafter made, available under or pursuant to any other Act", and "to any department, agency, or instrumentality of the United States" shall be used after November 15, 1943, to pay "any part of the salary, or other compensation for the personal services" of these three men.

### d. The Decision Below

Four opinions were handed down in the Court of Claims. That styled "the opinion of the court" (R. 33-41), and concurred in by Chief Justice Whaley and Judge Littleton, held that the respondents were entitled to recover, but did not reach the issue as to the constitutionality of Section 304. Each of the other three judges, however, while agreeing that respondents were entitled to recover, bottomed their decision on the unconstitutionality of Section 304. Judge Whittaker held that the section was in violation of Article I, Section 9, Clause 3 of the Constitution stating that "No bill of

attainder or ex post facto law shall be passed" (R. 41-42), and found it unnecessary to consider the other constitutional objections. Judge Jones, stating that the single issue in the case was as to the power of Congress to enact Section 304 (R. 42), held (R. 42-44) that it exceeded Congressional power. Judge Madden held (R. 44-48) that the section was unconstitutional both as a violation of the Fifth Amendment, and as inconsistent with Article I, Section 9, Clause 3 of the Constitution. All five judges agreed that respondents were entitled to recover.

On November 5, 1945, judgment was entered in favor of each of the respondents (R. 48-49). The petition for certiorari was filed on February 5, 1946, and was granted on March 25, 1946 (R. 49).

## SUMMARY OF ARGUMENT

### I.

The only issue in these cases is the Constitutional validity of Section 304. The minority view below, that Congress intended Section 304 as nothing more than a "stoppage of disbursing routine", and that consequently respondents are entitled to judgment even if the section be valid, is contrary to every canon of construction. All evidence, from the language of the section, from its legislative history, and from its necessary effect, if valid, points to an intention on the part of Congress to remove respondents from office on November 15, 1943, or at least to prevent any obligation to them for salary from being created after that date. *United States* v. *Dickerson*, 310 U. S. 554. If it be valid, therefore, it is an effective bar to recovery. If it be invalid, however, as we believe it is, it had no effect on either the tenure of respondents' offices nor on the obligation of the United States to compensate them for their services, and they are entitled to recover.

## II

The first constitutional objection to Section 304 is that it constitutes an invasion of the powers and responsibilities of the executive branch of the Government, in that its purpose as well as its effect, if valid, is to remove respondents from the Government service, and keep them out. Congress has not been granted, by the Constitution, a power directly to remove the individual incumbents of Government positions, except in the legislative branch, and except by the constitutional process of impeachment. In the light of the separation of powers principle, a power of direct removal in Congress would necessarily require affirmative evidence of its existence. Actually, the contrary is true; all evidence indicates that Congress possesses no such power. The specific grant to Congress of the impeachment power itself suffices to negative any grant of a general removal power, as both its history in the Constitutional Convention and its subsequent interpretation confirm. But if more proof be needed, it is supplied by the specific grant to the executive of the power to appoint, with its well-recognized concomitant power to remove, and by the very nature of the grant of "the Executive Power", as adumbrated by the experience under the Articles of Confederation, the nature of executive power, and the explanations contained in the great debate of 1789 in Congress. Neither the Congressional power to "vest" the power of appointment of certain officers, nor the "necessary and proper" clause, supply any basis for a contrary construction. *Myers* v. *United States*, 272 U. S. 52, 161. Nothing in either the *Myers* case, nor in *Humphrey's Executor* v. *United States*, 295 U. S. 602, is to the contrary; both dealt with the power of Congress to limit executive removals. Indeed, the Court in the *Myers* case specifically denied to Congress, or to either branch of it, the power to remove.

Nor does Congress possess even a restricted power of removal of "employees" as asserted by some of the House proponents of Section 304. The identity of the source of

Congressional power over "officers" and "non-officers" compels the conclusion that the same identity exists with respect to the claimed power of removal—it does not exist in either case. Moreover, the diverse nature of the positions which are held by "officers" leads to such strange boundaries for the asserted power that it confirms the conclusion that Congress possesses no such power. Alternatively, respondents here are, in any event, "officers", not "employees". As to respondent Lovett, there can be no question; and as to the other two respondents, the same conclusion is indicated by the present organization of the executive branch. Finally, there is nothing in the nature of the Federal Communications Commission, in which respondents Watson and Dodd were employed, which in any way requires or permits any different conclusion.

Since, therefore, Congress does not possess a power of direct removal of respondents, Congress may not exercise a power of removal otherwise denied to it by a misuse of the appropriating power. That power, like all others held by Congress, is subject to constitutional limitations. *United States* v. *Butler*, 297 U. S. 1. And by Section 304 Congress has attempted to exceed those constitutional limitations. The power to remove a man from his position is tantamount to the power to control the manner in which the affairs of that position will be exercised, and that, if it be possible, spells the end of independent executive and judicial departments. *State* ex rel. *Tolerton* v. *Gordon*, 236 Mo. 142, 139 S. W. 403.

The conditional nature of this rider does not change the result. No matter how conditioned, the rider purports to exercise a power to remove that Congress does not possess. The condition is no more than the manner in which Congress has chosen to frame the assertion of power; if it does not have the power at all, any conditions that may be annexed are irrelevant. Certainly the Senate approval requirement does not make the rider equivalent to impeachment.

## III

The second constitutional objection to Section 304 is that it is a bill of attainder within the prohibition of Article I, Section 9, clause 3 of the Constitution. Such bills were, in 1789, viewed with abhorrence as wholly unworthy of a free government, and no voice was raised in protest at their categorical prohibition by the Constitution. The need for liberal interpretation of the constitutional inhibition is apparent. Actually, however, this rider meets all of the tests laid down in the two classic cases in our law, *Cummings v. Missouri*, 4 Wall. 277, and Ex parte *Garland*, 4 Wall. 333. When we consider its substance, Section 304 is "a legislative act which inflicts punishment without a judicial trial", as it is defined in the *Cummings* case, and meets not only the tests enunciated by the majority in that case, but those laid down by the minority, as well. No one can doubt that Section 304 is "a legislative act which inflicts punishment"; indeed, the punishment which it assesses—permanent disqualification from office—is the same as the extreme punishment permitted upon conviction after impeachment, or upon judicial conviction of a few serious crimes. No one can doubt, again, that respondents were found guilty "without a judicial trial"; even an impeachment trial is not that, and the safeguards and limitations of an impeachment trial were conspicuous, here, by their absence. Section 304 exhibits, in fact, all of the characteristics of bills of attainder, and must be condemned on that ground alone.

## IV

The third constitutional objection to Section 304 is that it denies to respondents the safeguards and rights guaranteed to them by the Fifth Amendment. The objection is on both the substantive and procedural levels.

Substantively, the Fifth Amendment guarantees that no particular person should be arbitrarily singled out for legislative action. *Cf. Hurtado v. California*, 110 U. S. 516, 535. Here, the rider sets up no class of persons, it enacts

no general law applicable to all who fall within its ambit, and it lays down no standards or rules. It is simply special legislation punishing these respondents, and no one else. Procedurally, the rider is likewise objectionable. Methods which may be appropriate when Congress is creating legislation fall far short of due process when Congress purports to exercise judicial magistracy. In the notice of hearing, in the practical—and in the case of Dodd the actual denial of opportunity to respondents to acquaint themselves with the charges against them, in the secret hearings, in the failure to advise respondents—or even Congress—of much of the evidence, or the identity of their accusers, in the failure to report evidence favorable to respondents, and in the manner in which Congress itself acted upon the reports of the Kerr Committee—in all of these respects, the manner in which respondents were convicted denied them even elementary due process. Again, Section 304 must stand condemned.

## ARGUMENT.

Section 304, whatever else it may be, is an innovation. There is no precedent for it, so far as we know, in our history under the Constitution.

The question whether Section 304 is consistent with constitutional limitations is obviously one of paramount importance. For that reason we have undertaken to deal fully with each of the issues. Even when the ultimate answer is clear, as we believe it is in this case, a constitutional issue of this magnitude demands a comprehensive presentation.

Nor do we imply, because we assert three bases of invalidity, that any one alone would be inadequate. We believe, first, that Section 304 is unconstitutional because, in permanently removing these respondents from Government employment, it constitutes an improper interference with a coordinate branch of the Government. We believe, second, that Section 304 is unconstitutional because it is a bill of

attainder. Third, we believe Section 304 is unconstitutional because it denies to respondents due process of law. On any one of these bases, Section 304 must fall.

The minority "opinion of the court" below, however, raises one further issue: Whether disposition of the instant cases requires a decision of the constitutional questions. We believe, of course, that it does. We will proceed, first, to that issue, and then discuss the constitutional points in the order mentioned above.

## I

### The Sole Issue in the Instant Case is the Constitutional Validity of Section 304.

The court below was unanimous in holding respondents entitled to full recovery of the amounts claimed. The opinion of Chief Justice Whaley, however, concurred in by Judge Littleton (R. 33-41), concludes that in reaching that decision "it is immaterial whether Section 304 * * * or any part thereof, is constitutional or not" (R. 41). Examination of the opinion indicates that the basis for that decision was the preliminary conclusion that there was "no rational basis for construing the Act [Section 304] otherwise than as a mere stoppage of disbursing routine, nothing more", and that "the obligation was undisturbed" (R. 40). Although the reasoning of Chief Justice Whaley results in a full recovery by each respondent, we believe, with the Department of Justice (Pet., pp. 8-14) and Special Counsel for Congress (Memorandum, p. 7), and with the other Judges of the Court of Claims, that Chief Justice Whaley and Judge Littleton were clearly in error in so construing Section 304.

*A. THE PURPOSE OF SECTION 304 AND ITS NECESSARY EFFECT, IF VALID, WERE TO REMOVE RESPONDENTS FROM OFFICE.*

The touchstone for the construction of Section 304 is, of course, the intention of Congress, expressed in the language of the statute, its legislative history, and its obvious purpose and effect. "The policy as well as the letter of the law is a guide to decision." *Markham* v. *Cabell*, No. 76, decided December 10, 1945. See also *United States* v. *Dickerson*, 310 U. S. 554; *United States* v. *Valte*, 233 U. S. 509; *Dunwoody* v. *United States*, 143 U. S. 578; *United States* v. *Langston*, 118 U. S. 389; *United States* v. *Mitchell*, 109 U. S. 146; *National Labor Relations Board* v. *Thompson Products, Inc.*, 141 F. (2d) 794 (C. C. A. 9th). Those indicia make it clear beyond peradventure that Congress did not merely direct a "stoppage of disbursing routine", but intended to remove respondents from their offices by destroying the substantive obligations to pay them for their services.

1. *The Language of Section 304.*—Though cast in terms of a denial of appropriation, Section 304 is, on its face, far more than that. It is not the simple limitation of particular funds to a particular purpose, or even of funds already appropriated in other acts. The ban is permanent—no appropriation "which is now, or which is hereafter made available under or pursuant to any other Act" may be used to pay respondents any compensation for personal services. This is true not only of appropriations to the departments of the government in which respondents were then employed, but also of any appropriation "to any department, agency or instrumentality of the United States". Such language is certainly inconsistent with a simple desire to effect a "stoppage of disbursing routine"; it indicates plainly that the real purpose of the section is to remove respondents permanently from office.

Again, Section 304, by its terms, provides a procedure by which respondents could be appointed to their positions so as to entitle them to compensation—appointment by the

President by and with the advice and consent of the Senate prior to November 15, 1943. Unless respondents were being removed from their offices, that provision appears to be wholly superfluous, and again inconsistent in every way with a mere "stoppage of disbursing routine".

2. *The Legislative History of Section 304.*—When we turn, however, from the terms of Section 304 to its legislative history, any possible doubts which might remain are effectively destroyed. That history reveals beyond question that the purpose, indeed the sole purpose, of Section 304 was to remove respondents from office.

When the House of Representatives had reached its dilemma on Mr. Pickens (see p. 12, *supra*), Mr. Cannon, the Chairman of the Committee on Appropriations resolved the problem by promising the introduction of a resolution which would provide a sub-committee to hear the charges against each individual. Under that resolution, he promised, the subcommittee would "if the charges are sustained, take *immediate action to see that he is promptly separated from the public payroll*" (*Cong. Rec.*, Vol. 89, p. 710. Italics supplied).[8]

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[8] The purpose for which Section 304 was designed had, indeed, become manifest even earlier. Mr. Dies' original speech on February 1, 1943, had concluded (*Cong. Rec.*, Vol. 89, p. 486):

> • • • I submit it is now in order that the Committee on Appropriations take immediate and vigorous steps *to eliminate these people from public office.* (Italics supplied).

Mr. Hendricks, who first attempted to implement Mr. Dies' suggestion by a somewhat less sweeping rider, also made clear his intent to affect the employment of the 39 individuals (see pp. 11-12, *supra*). He said (*id.* p. 646):

> If the Treasury Department and the Post Office Department each has the right to hire anyone under this bill, *then we have the right to put in the names of people in this bill that they cannot hire.* (Italics supplied).

And Mr. Hoffman, defending the Hendricks rider, was even more specific. He stated (*id.* p. 698):

The immediate sponsor of H. Res. 105 was Mr. Sabath. In introducing it on February 9, he stated (*id.* p. 735):

> I have the utmost confidence in the chairman and the members of the great Committee on Appropriations and that they will make a fair and impartial investigation, and that if there is anything against any of these men they will refuse to appropriate for their salaries *and force their separation from the service.* (Italics supplied.)[58]

Indeed, H. Res. 105 itself authorized and directed the Kerr Committee to examine charges "that certain persons in the employ of the several executive departments and other executive agencies are unfit *to continue in such employment*" (italics supplied).

The Kerr Committee has left no doubt of the effect which it expected would follow its trials and its judgments. In its first report to the Committee on Appropriations, the Kerr Committee stated (H. Rep. No. 448, *supra*, p. 4):

> Your committee has dealt with the investigation directed under the House resolution as in the nature of an inquest of office, *with the aim to make such recommendations as may be justified, toward purging the public service of ungone[sic] guilty* . . . (Italics supplied.)

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* * * Those advancing the argument forgot that *Congress was not sitting as a trial court, but as an employer.*

* * * *Certainly the Congress, which appropriates the money for the jobs, has the right to say who shall hold those jobs* or if it desires to abolish the jobs. We may even end the agency in which they are employed.

* * * * *

We were not sitting here then, and we will not be sitting here today when we come to this amendment in such capacity [as trial judge]. *We are here as a hiring and a firing agency. We appropriate the money, and we have a right to say who we want on the payroll.* (Italics supplied.)

[58] See also the further remarks of Mr. Cannon after H. Res. 105 had been introduced. *Id.* pp. 740-741.

The same report, in passing judgment of "guilty" upon respondents Watson and Dodd, stated that the Committee found each "unfit for the present *to continue in Government employment*" (*id.* pp. 6, 7; italics supplied). The same finding was later made for respondent Lovett—that he was "unfit *to continue in the employment* of the United States Government" (*id.* p. 12; italics supplied).

The report of the Committee on Appropriations, which proposed Section 304, also made its purpose clear. That report (*id.* pp. 1-2), after approving the finding of the Kerr Committee that the respondents were "unfit to continue in Government employment", and noting that H. Res. 105 gave the Committee on Appropriations authority to introduce any implementing legislation, offered Section 304 for that purpose. The Committee could not have said more plainly that Section 304 was intended to ensure that respondents did not "continue in Government employment".

Finally, we may refer briefly to the debates on Section 304, particularly in the House. Mr. Kerr, in defending Section 304 on May 18, stated (*Cong. Rec.*, Vol. 89, p. 4582):

> I may say that the committee fully understood the seriousness of this matter. *It understands how serious it is to remove a man from his office* and understands that a stigma may be placed upon him when that act is done. I think the committee fully understands the implications involved in one branch of the Government in attempting *to remove an employee of another branch*. Those things we took into consideration and those things we attempted to handle justly and properly in the light of the evidence in this matter. (Italics supplied.)

Chairman Cannon, of the Committee on Appropriations, was most explicit in urging the approval of the final conference report (*id.* pp. 7127-7128):

> So let us be practical for a minute. *The House seeks the dismissal of these three men. How can that ob-*

*jective be accomplished?* Not by defeating this report. That would leave them in office.

If you reject this conference report, they retain their jobs undisturbed.

*But if you agree to this conference report you adopt a plan under which these men will be removed from office* before the 15th of next November unless appointed by the President and confirmed by the Senate.

You may take your choice. I know the alternative is not exactly to our liking, but we face a situation—do you want to take them out or do you want to leave them in. *If you reject this report, you leave them in, and if you agree to it, you adopt the only available method of removing them.* (Italics supplied.)

Finally, the Court should note that in adopting H. Res. 105, the House of Representatives contemplated that legislation introduced by the Kerr Committee pursuant to the Resolution would have the effect of "changing existing law", within the meaning of House Rule XXI, Clause 2, and could not, therefore, be made part of an appropriation bill. Consequently, H. Res. 105 specifically provided an exemption from that requirement. This exemption is specifically adverted to by the Committee on Appropriations in its report on Section 304 (H. Rep. No. 448, *supra*, p. 2). There could scarcely be stronger evidence that Section 304 was not intended solely as a limitation on the administrative action of the disbursing officers.

3. *The Necessary Effect of Section 304.*—That the effect of Section 304, if it be valid, is necessarily to effectuate respondents' discharge can be further demonstrated by reference to the long-standing general statutory prohibition against the acceptance of voluntary services. Rev. Stat. Sec. 3679, as amended (34 Stat. 48, U. S. C., Title 31, Sec. 665). Section 3679 provides that no department or officer of the Government shall "accept voluntary service for the Government". The Attorney General has ruled that this provision is generally applicable except where the statutes do not require even a minimum salary. 30 Op. Atty. Gen.

51. Respondents all held positions to which Congress had by law attached compensation.[9]

Thus Section 304 provides that respondents shall not, after a certain date, receive any compensation from the United States Government; Section 3679 of the Revised Statutes provides that voluntary services in the positions which respondents then held could not be accepted. The inescapable effect of the enactment of Section 304, if valid, is thus to remove respondents from their offices—an effect which the legislative history of the provision discussed above, shows that Congress plainly intended.

If Section 304 is not unconstitutional, therefore, respondents were legally removed from their offices on November 15, 1943, their services thereafter were those of volunteers and improper under Section 3679, and they are not entitled to recover in this action. If that Section is invalid, however, it could not affect respondents' tenure of their offices, nor the Government's obligation to pay the compensation fixed by law for those offices. They are, therefore, entitled to recover in this action.

*B. IF SECTION 304 IS VALID IT DESTROYED ANY OBLIGATION TO PAY RESPONDENTS COMPENSATION AFTER NOVEMBER 15, 1943, EVEN IF IT DID NOT OPERATE TO REMOVE THEM FROM OFFICE.*

Apart from whether Section 304 actually attempted a removal from office, which we think it plainly did; no support can be found for construing it, as Chief Justice Whaley and Judge Littleton did below, as intended only to stay the administrative "disbursing routine", and not in any way to disturb the Government's obligation to pay respondents' compensation. The effects which follow from such a construction of the statute make it seem absurd on its face.

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[9] *Lovett*, R. 19, and U. S. C., Title 5, Sec. 678a, 46 Stat. 1005; *Watson*, R. 24, and U. S. C., Title 47, Sec. 154(f)(1), 48 Stat. 1006, as amended; *Dodd*, R. 29-30, and U. S. C., Title 47, Sec. 154(f)(1), 48 Stat. 1006, as amended.

Congress must be assumed to have been familiar with the long line of decisions holding that the mere withholding of an appropriation would not, without more, affect an officer's or an employee's legal right to his salary, enforceable by suit in the Court of Claims. *United States* v. *Langston*, 118 U. S. 389; *United States* v. *Tutte*, 233 U. S. 509; and cases cited at R. 39. It seems hardly conceivable that Congress intended that the respondents would be unaffected by Section 304 except that they, alone *among all federal* employees, would collect their salaries not from the regular disbursing officer but through the medium of periodic suits in the Court of Claims. Yet, assuming its full validity, this is the limit of the effectiveness of Section 304 as construed by Chief Justice Whaley.

Furthermore, the intention to order disbursing officials of the Executive Branch of the Government not to perform their administrative duties of paying valid and legal salary obligations would indicate a degree of irresponsibility not lightly to be imputed to Congress. *Cf. Belknap* v. *United States*, 150 U. S. 588, 595; *Lynch* v. *United States*, 292 U. S. 571, 587. In addition, such arbitrary action would so plainly constitute an unwarranted and unconstitutional interference by the Legislative Department with the administrative functions of the Executive (see Point II, *infra*) that this construction of the Act should be adopted only for the most compelling and convincing reasons.

Actually, the present case is governed by *United States* v. *Dickerson*, 310 U. S. 554, which involved an appropriation act providing that "no part of any appropriation contained in this or any other Act for the fiscal year * * * shall be available for the payment" of any re-enlistment allowance for that year. This Court denied a recovery of a re-enlistment allowance, holding that the appropriation act provision effectually destroyed the substantive obligation to pay such allowances. The Court relied heavily upon the legislative history of the Act as showing that the intent of Congress was to destroy the substantive obligation and not merely to avoid making the necessary appropriation.

Chief Justice Whaley was wholly unsuccessful in distinguishing that case. The extent of his effort was to point to a slight difference in the mode of expression used in the two statutes; Section 304, instead of making appropriations "unavailable", as Congress had expressed it in the re-enlistment provisions, provides that no "available" appropriations "shall be used". This seems clearly to be a distinction without a difference. One simply cannot distill out of this slight dissimilarity in expression a basis for two radically different congressional intents—one a refusal to meet a valid obligation, and the other a refusal to permit an obligation to be created at all. Indeed, if one were to argue a distinction on any such basis, it would appear that the inferences are exactly contrary to those which Chief Justice Whaley assumes. It seems more likely that, as a matter of statutory construction, Congress is destroying a substantive obligation (or refusing to permit one to be created) when it limits the use of an *existing* appropriation, as with Section 304, than when it makes a contemporaneous appropriation unavailable.

Again, therefore, if the rider be valid, respondents, in these actions. If it is invalid, however, it was, as we have already stated, a nullity for all purposes. *Norton v. Shelby County*, 118 U. S. 425. It could not affect respondents' tenure of their offices, nor the Government's obligation to pay the compensation fixed by law for those offices, and respondents are entitled to recover in this action. Respondents are not estopped to assert their right to sue notwithstanding the fact that the amounts were not in fact paid when they became due. *United States v. Andrews*, 240 U. S. 90; *Glavey v. United States*, 182 U. S. 595. Nor is there any conflict between the respondents' position and the constitutional provision upon which *amicus curiae* relied so heavily in the court below—that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by law." These are not suits for specific performance of contracts to pay money. Respondents seek

in these cases, as in every other salary suit in the Court of Claims, only to establish the legal obligation of the United States to compensate them for their services.[10] Certainly this Court cannot assume, as *amicus curiae* argued in concluding their brief in the court below, that the Congress in existence at the time such a judgment is rendered would refuse to satisfy that judgment, and that consequently the case is moot.

It is submitted, therefore, that the question of the validity of Section 304 is squarely and necessarily presented in these suits, and that decision of this question cannot be avoided on any acceptable construction of its provisions. We proceed to the constitutional questions.

## II

### Section 304 Is Unconstitutional as an Improper Interference With the Executive Department.

The first fundamental objection to Section 304 is that it constitutes an invasion of the powers and responsibilities of the executive branch of the Government. By that section, Congress asserts a power to remove respondents permanently from Government employment. We believe that Congress has no such power, except pursuant to the impeachment procedure. Congress cannot use its power

[10] Indeed, if it be material, there *were* existing appropriations for both the Virgin Islands and the Federal Communications Commission in existing appropriation acts. Section 304 itself, stated that no "available" appropriation "should be used". But being wholly void and of no effect, the rider consequently did not limit those appropriations.

Actually, we can go one step farther: even if all of the funds for the Federal Communications Commission, for example, had been appropriated in the bill to which Section 304 were attached, the issue would be one of severability of provisions in accordance with the usual canons—would Congress intend that the entire appropriation should fail if a limitation upon it were held unconstitutional. Almost certainly, it would not. Here, where the rider is on a wholly different bill, the question is not even presented.

over appropriations as a device by which to distort or destroy the fundamental nature of our Government as one of three great independent branches.

The defenders of Section 304 in the House attempted to meet this objection on two grounds. Some argued that Congress, itself, was granted by the Constitution the power directly to remove individuals from Federal positions, and that in consequence there was no reason why Congress could not accomplish a removal by the less direct method of denying an individual his salary. Others, however, were willing to go further, and to contend that it was immaterial whether or not Congress had been granted by the Constitution a power to remove, since there were no constitutional limits on the power to appropriate.[11]

In order that both arguments may be fully answered, we deal with them separately. In Part A, *infra*, we will demonstrate that Congress has not been granted a power directly to remove the individual incumbents of Government positions—except, of course, by the impeachment process, and except, too, incumbents of positions in the legislative branch. In Part B, we will demonstrate that there *are* limits on the appropriating power, and that Congress may not use it to create for itself a power which is otherwise denied by the Constitution.

Preliminarily, it will be of assistance to restate in summary fashion the nature of Section 304. As we pointed out above (pp. 31-36), we think it plain that the purpose of Sec-

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[11] There is an inherent ambiguity in the phrase "a power to remove"; either it may mean a power granted to Congress by some provision of the Constitution other than the power to appropriate, or it may mean the power to effectuate a removal by the conditioning of an appropriation. We will attempt to avoid the ambiguity by the use of the phrase "*directly to remove*", in describing the argument that Congress could remove an incumbent by a direct statute, such as one stating "John Smith is hereby removed as Assistant Attorney General" or "Robert Morss Lovett is hereby removed as Executive Assistant to the Governor of the Virgin Islands."

tion 304 and, if valid, its necessary effect, were to remove respondents from office on November 15, 1943. The present constitutional objection to the rider does not, however, depend upon that construction; the question is equally presented if the provision be construed as only a permanent prohibition of the payment of any compensation for the personal services of those three individuals. That such Section 304, if it be valid, certainly did. In language presumably as sweeping as the Committee on Appropriations could devise, it prohibits the use of any present or future appropriation to pay compensation to any of the three respondents—except as jurors, or as members of the armed forces.[12]

Short of a direct ouster, there is no more effective way in which to consummate a man's permanent discharge than to deny him, permanently, any compensation for his work. Few individuals are in a position to continue for more than a very short time at work for which they will never receive compensation. The point was made with force in *State ex rel. Tolerton v. Gordon*, 236 Mo. 142, 139 S. W. 403, in which the Supreme Court of Missouri held invalid a similar attempt by the legislature to eliminate a state official by denying him compensation. The Court said (139 S.W. at pp. 408-409):

> By depriving relator of any compensation for the services which the game law demands he should render, his enforced removal from the office would be as effectually brought to pass as if ordered and enforced by a direct mandate of a court. It is not essential to the capture of a city or fort that it should be stormed or taken by force. The same result may be reached and with equal certainty by cutting off supplies by maintaining a successful blockade or siege. In the Merchant of Venice the leading character is made to

[12] The conditioning of this ban on an appointment by the President, and confirmation by the Senate, prior to November 15, 1943, had no effect, due to the belief by the President that Section 304 was invalid and his consequent refusal to acquiesce in it. See pp. 109-112, *infra*. The ban is now, therefore, permanent.

says: "You take my house when you do take the prop that doth sustain my house. You take my life when you do take the means by which I live."[13]

See also *State* ex rel. *Worrell* v. *Carr*, 129 Ind. 44, 53, 28 N. E. 88, 92; *People* ex rel. *Burbe* v. *Howland*, 155 N. Y. 270, 279, 49 N.E. 775, 778; *Cotten* v. *Ellis*, 52 N. C. 545, 548; *Reid* v. *Smoulter*, 128 Pa. St. 324, 336, 18 Atl. 445, 446. *Cf. Sleigh* v. *United States*, 9 C. Cl. 369.

Unquestionably, therefore, the purpose as well as the effect of Section 304, if it be valid, was to drive respondents out of the Government service, and permanently to keep them out. We turn, then to the first of the two grounds upon which the power of Congress thus to interfere with a coordinate branch of the Government was defended by its supporters in the House.

*A. CONGRESS HAS NOT BEEN GRANTED A POWER DIRECTLY TO REMOVE THE INDIVIDUAL INCUMBENTS OF GOVERNMENT POSITIONS EXCEPT BY IMPEACHMENT AND EXCEPT AS TO POSITIONS IN THE LEGISLATIVE BRANCH.*

Some of the members of the House who argued that Congress could directly remove individual incumbents from Government positions made no distinction as to the nature of the position involved. In their view, Congress was "a hiring and firing agency", and could, whenever it wished, remove the incumbents of practically any position in the Government. Others, however, limited their contention, and argued for a power directly to remove employees, but not

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[13] *Cf.* the statement of Hamilton in *The Federalist*, No. 79, speaking of the provision securing the compensation of judges: "In the general course of human nature, a *power over a man's subsistence amounts to a power over his will*" (italics in original). At an early period, the judges of Virginia remonstrated: "For vain would be the precautions of the founders of our government to secure liberty, if the legislature, though restrained from changing the tenure of judicial offices, are at liberty to compel a resignation by reducing salaries to a copper." *Cases of the Judges of the Court of Appeals*, 4 Call 135, 145 (Va. 1788).

officers. Mr. Keefe, a member of the Kerr Committee, may be taken as an example of the latter group. He stated (*Cong. Rec.*, Vol. 89, p. 4599):

> There are officers who are placed in office by and as the result of the enactment of legislation by the Congress creating those offices and fixing their tenure of office and fixing their salaries. As to these officials may I say that I would not contend for one moment that this Congress has the right to, in effect, remove them by refusing to appropriate money to pay their salaries. Congress has the undoubted right to abolish functions and agencies but not to in effect remove officials in this manner. But do not make that argument against this procedure where it merely involves a simple employee of the Government.

We shall answer both arguments, but adequately to answer Mr. Keefe's more limited contention requires that we first dispose of the more sweeping claim that Congress may directly remove any incumbent of practically any Government position.

Congress, of course, possesses only those powers specifically granted to it by the Constitution.[13a] If there be a power in Congress to remove the incumbents of Government positions in the executive and judicial branches, it must be granted to it by some clause in the Constitution. We believe that no such grant exists. Such a power would enable Congress to dominate the other coordinate branches of the Government. Indeed, the principle of the separation of powers is so basic to the question here in issue that a brief summary of it is warranted at the outset. With that principle in mind, we can then examine the constitutional allocation of powers between the legislative and the other departments.

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[13a] Article I begins: "All legislative Powers *herein granted* shall be vested in a Congress * * *." (Italics supplied.)

1 THE SEPARATION OF POWERS PRINCIPLE CONDEMNS ANY INTERFERENCE BY ONE DEPARTMENT WITH EITHER OF THE OTHERS EXCEPT TO THE EXTENT SPECIFICALLY AUTHORIZED BY THE CONSTITUTION.

Whether or not Montesquieu had correctly analyzed the British Constitution, his argument that popular government could be secured only by the mutual independence of the three great branches of government was certainly the touchstone for the members of the Constitutional Convention. Montesquieu, *Esprit de Lois*, Bk. II, c. 6; see Gouverneur Morris (*Formation of the Union* (1927), H. Doc. No. 398, 69th Cong., 1st Sess., p. 393); Madison (*id.* pp. 397-398); James Wilson (*id.* pp. 846, 947); *The Federalist*, No. 47; *Kendall* v. *United States*, 12 Pet. 524, 610. The first three Articles of the Constitution, establishing, and granting powers to, the legislative, executive and judicial departments, are a direct reflection of his views. They had, of course, been given emphasis by the obvious weaknesses of the Articles of Confederation, in which substantially all powers had been commingled in a legislative branch.

No one doubts, now, that the "separation of powers" doctrine is not "merely a matter of convenience or of governmental mechanism", but rather is "basic and vital"—intended to preclude "a commingling of these essentially different powers of government in the same hands". *O'Donoghue* v. *United States*, 289 U. S. 516, 530. The principle not only confines each of the three great departments to its own sphere, but also demands that each maintain its separate independence, free from *control* or *coercion* by the others.

This necessity for reciprocal freedom from interference has been variously expressed, though never doubted, from our earliest history. James Madison, in *The Federalist* (No. 48) expressed it by stating that none of the departments "ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers". Justice James Wilson, another member of the Constitutional Convention, stated it even

more strongly—that the proceedings of each of the three departments "should be free from the remotest influence, direct or indirect, of either of the other two powers". *Works* (Andrews ed. 1896) Vol. I, p. 367. Mr. Justice Story adopted the language of Madison, quoted above. Story, *Commentaries on the Constitution* (5th ed. 1891), Sec. 530. But perhaps there is no better statement than that of the Supreme Court in *O'Donoghue* v. *United States*, *supra* (289 U. S. at 530):

> If it be important thus to separate the several departments of government and restrict them to the exercise of their appointed powers, it follows, as a logical corollary, equally important, that each department should be kept completely independent of the others—independent not in the sense that they shall not cooperate to the common end of carrying into effect the purposes of the Constitution, but in the sense that the acts of each shall never be controlled by, or subjected, directly or indirectly, to the coercive influence of either of the other departments.

See also *Humphrey's Executor* v. *United States*, 295 U. S. 602, 630; *Myers* v. *United States*, 272 U. S. 52, 116.

There are, of course, several instances in which the Constitution has itself worked a blend of the various powers by authorizing or requiring the participation of more than one department of the Government in certain functions. For example, as germane to the instant case, there is the specific provision for Senate participation in the appointing process, and the power of impeachment given to Congress by which it may remove individuals occupying executive or judicial positions. The principle of the separation of powers requires, however, that in such cases the Constitution should be expounded to blend the acts of the several branches no more than the Constitution expressly requires, and that a specific grant of power to participate in one manner excludes an intention to allow further participation in a different way or under different guises. *Meriwether*

v. *Garrett*, 102 U. S. 472, 515; *Kilbourn* v. *Thompson*, 103 U. S. 168, 190; *Mugler* v. *Kansas*, 123 U. S. 623, 663; *Myers* v. *United States*, 272 U. S. 52, 116; *Springer* v. *Philippine Islands*, 277 U. S. 189, 201-202. As the Court stated in *O'Donoghue* v. *United States*, *supra* (289 U. S. at 530), "Such exceptions serve rather to emphasize the generally inviolate character of the plan."

In the light of these principles we turn to the provisions of the Constitution.

2. THE LANGUAGE OF THE CONSTITUTION CLEARLY NEGATIVES ANY DIRECT CONGRESSIONAL POWER OF REMOVAL.

The Constitution contains several provisions which, in varying degrees, relate to the removal power. Fairly interpreted in the light of the principles just stated, they leave no doubt that Congress has only one power of removal of incumbents of positions in the executive and judicial branches—the impeachment process.

In Article I, Congress is given its specific removal power *provided* that it be done in a certain way. Article I, Section 2, clause 5, provides:

> The House of Representatives * * * shall have the sole Power of Impeachment.

And Section 3, clauses 6 and 7 of the same Article provide:

> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.
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> Judgment in Cases of Impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any Office of Honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Finally, by the last clause of Section 8 of the same Article, Congress is given the power—

> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

By Article II, Section 1, clause 1, it is provided:

> The executive Power shall be vested in a President of the United States of America.

Section 2 of the same Article provides:

> The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.
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> He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.
>
> The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3 of Article II provides, in part:

> • • • he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

And Section 4 provides:

> The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

*a. The Impeachment Provisions, Which Are an Express Grant to Congress of a Direct Removal Power, Negative by Their Presence Any Other or Different Power of Direct Removal.*

The only specific reference in the Constitution to a power of removal, in other words, are those relating to the process of impeachment. By that process, Congress is accorded a specific authority to inject itself into the affairs of the other two coordinate branches by removing their personnel from office. This power is unfettered by either the executive power of pardon (Article II, Section 2, clause 1) or the power of judicial review. *Ritter* v. *United States*, 84 C. Cl. 293, *certiorari denied* 300 U. S. 668. The exercise of this power of removal, however, is hedged about with various safeguards—the Senate trial, and the two thirds rule, for example. Under the principle above stated, this specific grant of power is in itself practically conclusive proof that there is no direct removal power vested in Congress. Certainly every principle of construction condemns a result which would either make the impeachment process a superfluity, or make the restrictions on its substance a nullity, or both—and allow Congress directly to remove persons from Government service in a manner which would deny to the individual the guarantees so carefully spelled out in the impeachment clauses. Yet under the argument which we are now considering, such would unquestionably be the result.

Perhaps it is unnecessary to elaborate the point, but it may be desirable to note that the Framers of the Constitution intended the impeachment process to be the sole means by which the legislative branch might remove the personnel of other departments. Other methods of removal by the legislative branch which were known to or suggested for adoption by the Constitutional Convention were voted down.

A proposal was made by John Dickinson, of Delaware, for removal of judges by joint address. As stated in Madison's Journal (Farrand, *Records of the Federal Convention of 1787* (1934), Vol. II, p. 428):

> Mr. Dickinson moved as an amendment to sect. 2—art. XI after the words "good behavior" the words "provided that they may be removed by the Executive on the application (by) the Senate and House of Representatives."

The proposal had precedent in England and in the Colonies. The Act of Settlement of 1701 (12 & 13 Wm. III. c. 2) had provided that judges could be removed not only by impeachment but also by joint address of both Houses of Parliament, and the Pennsylvania Constitution of 1776 had contained a similar provision (Thorpe, *Federal and State Constitutions* (1909) Vol. V, p. 3088). The Dickinson proposal, however, was defeated by a vote of 7 States to 1. Farrand, *supra*, Vol. II, p. 428.

The second method of removal, also suggested by Mr. Dickinson, provided that the following words be added to the section dealing with the Executive (Farrand, *supra*, Vol. I, p. 78):

> * * * to be removable by the national legislature upon a request by a majority of the legislatures of the individual states.

This proposal was also defeated by a decisive vote—9 States to 1 (*ibid.*).

The third method of removal of officers, which was well known to the Framers, was bills of attainder. See Point III,

*infra*. There was no disposition to question the absolute ban on such legislative actions (see pp. 114-115, *infra*).

Not only were the impeachment provisions intended to be the *sole* method of legislative removal, but it is also apparent that the Framers determined the scope of the impeachment power in the light of a full awareness that it was the sole means by which the legislative branch might remove executive or judicial personnel. Thus, Madison's Journal states (Farrand, *supra*, Vol. II, p. 550):

> The clause referring to the Senate, the trial of impeachment agst. the President for Treason & bribery, was taken up.
>
> Col. Mason. Why is the provision restrained to Treason & bribery only? Treason as defined in the Constitution will not reach many great and dangerous offenses. Hastings is not guilty of Treason. Attempts to subvert the Constitution may not be Treason as above defined—As bills of attainder which have saved the British Constitution are forbidden, it is the more necessary to extend the power of impeachments. He movd. to add after "bribery" "or maladministration." Mr. Gerry seconded him—
>
> Mr. Madison. So vague a term will be equivalent to a tenure during pleasure of the Senate.
>
> Mr. Govr. Morris, it will not be put in force & can do no harm—An election of every four years will prevent maladministration.
>
> Col. Mason withdrew "maladministration" & substitutes "other high crimes & Misdemeanors" (agst the State)

The conclusion that impeachment is the sole method of legislative removal is further reinforced by legislative precedents. In 1789, the First Congress engaged in an extensive debate on the President's removal power during the discussion of the bill establishing the Department of Foreign Affairs. We shall have occasion to refer to it in more detail below, pp. 69-70. During that debate, even those who objected to the prevailing view that the sole power of removal was in the President by constitutional grant agreed

that legislative removals were possible only by impeachment. Thus Mr. Lawrence, one of those who argued for a legislative power to vest the removal function in either the President or the President and Senate together (see p. 70, *infra*) cited the impeachment power as the ultimate legislative control. He stated (1 *Annals of Congress* 377):

> We can say he shall hold it for three years from his appointment, or during good behavior, and we may declare unfitness and incapacity causes of removal, and make the President alone judge of this case. We may authorize the President to remove him for any cause he thinks proper. It is in our power to make such declaration; but at the same time the Constitution provides, that the President shall not have it in his power to hold a person in office who has been guilty of crimes or misdemeanors against the Government; the power of removal in such cases is in the Legislature, by impeachment.

And Mr. Gerry, who believed that under the Constitution the President should share the removal power with the Senate, stated (*id.* p. 380):

> If there is a power of removal, besides that by impeachment, it must vest somewhere. It must vest in the President, or in the President and Senate, or in the President, Senate and House of Representatives. Now, there is no clause which expressly vests it in the President. I believe no gentleman contends it is in this House, because that would be that mingling of the Executive and Legislative powers gentlemen deprecate.

Mr. Gerry repeated the same argument later in the debates (*id.* at 501-502). See also Mr. Livermore (*id.* at 381); Mr. Boudinot (*id.* at 469); Mr. Lawrence (*id.* at 482).[14]

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[14] The only expression of the opinion that Congress could be a "hiring and firing agency" was expressed by Mr. Sedgwick. He stated (1 *Annals of Congress* 520-521): "The power of creating offices is given to the Legislature. Under this general grant, the Legislature have it under their supreme decision to determine the whole organization, to affix the tenure, and declare the control

Again, at the trial of the impeachment of Justice Chase, Luther Martin, who had been a delegate to the Convention, made it clear that he believed that impeachment was the *sole* means of legislative removals. He stated (14 *Annals of Congress* 436):

> I again repeat, that as the framers of the Constitution of the United States did not insert in their Constitution such a clause as is inserted in the Constitution of Pennsylvania, it is the strongest proof that they did not mean a judge or other officer should be displaced by an address of any portion of the legislature, but only according to the Constitutional provisions.

The same view was taken in 1837 by a Select Committee of the House Appointed to Inquire into the Condition of Executive Departments of the Government. On March 3, 1837, it reported (H. Rep. No. 494, 24th Cong., 2d Sess., pp. 2, 3):

> The power of the House to institute an inquiry of this kind into the conduct of the Executive, directly personal in its application, can nowhere exist, unless it be an incident of the "sole power of impeachment" which is given to the House of Representatives by the constitution. This power extends to the President, and all civil officers of the United States, on charges of treason, bribery, or other high crimes and misdemeanors. . . .
> It follows, therefore, that the only constitutional power under which the House of Representatives, as a co-ordinate branch of the Government, could constitute a committee to inquire into alleged "corrupt violations of duty" by another co-ordinate branch of the Government, (the Executive,) is the "power of impeachment."

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This right of determining arises, not from express words, but by natural construction. So the Legislature may determine that an office may be held three, five, or seven years; to be removed by the President, the President and Senate, or the Legislature, or any other person whom they might introduce in office, merely for that particular purpose." See also 1 *id.* at 543. The vote was an express repudiation of his views; he voted in the minority. See 1 *id.* at 585. See *infra*, p. 70.

On at least two occasions, the view that direct legislative removals could be accomplished solely by impeachment has been confirmed by action of Congress. On March 21, 1867, the Committee on Public Expenditures of the House reported the following resolution (see *Cong. Globe*, 40th Cong., 1st Sess., p. 255):

> *Resolved*, That it is the sense of this House that Henry A. Smythe should be immediately removed from the Office of Collector of the Port of New York; and that the Clerk of the House cause a certified copy of this resolution to be laid before the President of the United States.

This resolution, it should be noted, did not purport to remove Mr. Smythe from his position; it went no further than a statement by the House that *the Executive branch* should remove him. Yet even this, the House believed, exceeded its powers; it could proceed *only* by impeachment. Mr. Butler of Massachusetts made this objection (*id.* p. 255):

> * * * we have one way in which to demand that an officer shall be removed, and that is by impeachment, and in no other way. * * * I have confidence in the House that we will speak the voice of the people in the only form known to the Constitution.

Mr. Randall of Pennsylvania made the same point (*id.* p. 256):

> It is not my purpose in any manner whatever to defend or palliate the conduct of Mr. Smythe. With that I have nothing to do. But as a member of this House I have a right to suggest that the House should not be placed in a wrong position upon this subject or upon any other. We have nothing whatever to do with the executive department of the Government. If this House thinks Collector Smythe has been guilty of malfeasance it is within its province to impeach him as far as is provided in the Constitution. But that this House should travel out of the line of custom or the path of duty and express an opinion upon the removal of an officer is a thing that, in my judgment, is entirely wrong.

And Mr. Eldridge of Wisconsin added (*id.*, pp. 282-283):

> I cannot vote for the resolution introduced by the gentleman from New York (Mr. Hulburd), because I look upon the appointment and removal of officers of the kind named as beyond the jurisdiction of Congress. It seems to me if we have a right to say this man ought to be removed, then certainly we have the right to name his successor and insist upon his appointment. I suggest to the gentleman from New York (Mr. Hulburd), before calling the previous question, that he modify his resolution so as to name the successor of Mr. Smythe. I suggest also that he name Horace Greeley for the place. He will then be able to accomplish by resolution his entire purpose, remove the incumbent and appoint such person as he may desire to hold office. I think there can be no doubt that we have the jurisdiction to do one as clearly as the other.

See also Mr. Chanler of New York (*id.* p. 283), and Mr. Bingham of Ohio (*id.* p. 335).

On March 22, 1867, an amendment was offered, which struck out all except the word "Resolved," and substituted (*id.* p. 282):

> That it is the sense of this House that Henry A. Smythe, collector of the Port of New York, ought to be impeached; and that the Committee on Public Expenditures proceed forthwith to prepare articles of impeachment.

Even this, however, was objected to, because no committee had then made an investigation to determine whether there was ground for articles of impeachment. The resolution was further amended, therefore, to refer the matter back to the Committee on Public Expenditures to make an investigation and, if they deemed guilt established, to prepare articles of impeachment, and this resolution was agreed to (*id.*, pp. 284-290). It does not appear that the Committee ever reported. See Hinds' *Precedents of the House of Representatives* (1907) Vol. III, Sec. 2501, pp. 1006-1007.

Beginning January 28, 1924, a similar resolution was considered in the Senate. The resolution, as modified on February 1, provided (*Cong. Rec.*, Vol. 65, p. 1782):

> *Resolved*, That it is the sense of the United States Senate that the President of the United States immediately request the resignation of Edwin Denby as Secretary of the Navy.

This resolution, too, like that of 60 years before, did not purport to remove the officer; again it was a recommendation that *the President* remove him. Although it was opopposed by many Senators on the ground that even a *recommendation* by the Senate was improper, it was finally passed on February 11 by a vote of 47 to 34 (*id.* p. 2245). During the course of the debate, however, many Senators made it clear that the sole means of legislative removal was by impeachment. Senator Borah of Idaho, for example, stated (*id.* pp. 2072, 2073):

> Mr. President, I shall be comparatively brief, I trust, in stating my position in regard to the pending resolution. I am unable to support it. * * * I am perfectly aware that just at this particular time, under the dreadful revealments which have been made and a very just aroused feeling which obtains throughout the country, the view which I entertain will not be regarded, perhaps, as coming up to the full measure of duty at this time. But I must be controlled by the plain fundamental provisions of our Constitution and depend upon time to justify my position. Permanent good and substantial results are only accomplished in matters like these by pursuing lawful and constitutional methods.
>
> * * * * * *
>
> But that is not all, Mr. President. In my opinion, *impeachment is the only way by which we can lawfully and constitutionally proceed in this matter.* It is the constitutional way; it is the effective way; it is the drastic way; and it is the way by which we can mete out the punishment for this offense if it has been committed, and in no other. (Italics supplied.)

And Senator Bruce of Maryland stated (*id.* p. 1982):

> I am opposed to this resolution because it invades a province of authority that belongs exclusively to the executive department of the Government. The Senate has no constitutional power to remove any public officer of the United States; it has no constitutional power to unite with the President in the removal of any such public officer; it has no constitutional power even to make any suggestion or recommendation looking to the removal of any such public officer.

See also the further remarks of Senator Borah, *id.* p. 2074. And see also Senator Norris of Nebraska (*id.* p. 1730); Senator Pepper of Pennsylvania (*id.* p. 1734); Senator Edge of New Jersey (*id.* pp. 1981-1982); Senator Glass of Virginia (*id.* pp. 2076-2077); and Senator Shortridge of California (*id.* p. 2169). No one, as far as appears from the debate, believed that the Senate, or Congress, could effect a direct removal of Secretary Denby in any other way. President Coolidge refused to accept the resolution, considering it an interference with Executive function. He said (*id.* p. 2335):

> The dismissal of an officer of the Government, such as is involved in this case, other than by impeachment, is exclusively an executive function. I regard this as a vital principle of our Government.

See also, to the same effect, the statement of President Cleveland quoted *infra* pp. 72-73.

*b. The Specific Grant to the Executive of the Power to Appoint Is Itself Equivalent to a Grant of the Power to Remove.*

Apart from the necessary inferences to be drawn from the impeachment provisions, the absence of a direct Congressional power of removal is further indicated by the specific grant to the executive department of the general appointive power. It has been long settled that, in the absence of specific provisions to the contrary, the power

of removal is an incident solely of the power of appointment. *Matter of Hennen*, 13 Pet. 230, 259-260; *United States* v. *Allred*, 155 U. S. 591, 594; *Keim* v. *United States*, 177 U. S. 290, 293, 294; *Reagan* v. *United States*, 182 U. S. 419, 424; *Shurtleff* v. *United States*, 189 U. S. 311, 314-315; *Burnap* v. *United States*, 252 U. S. 512, 515; *Wallace* v. *United States*, 257 U. S. 541, 544; *Myers* v. *United States*, 272 U. S. 52, 119; *Thwing* v. *United States*, 16 C. Cl. 13; *Howard* v. *United States*, 22 C. Cl. 305, 316; *Costello* v. *United States*, 51 C. Cl. 257, 264; In re *Eaves*, 39 Fed. 21 (C. C. W. D. N. Car.); 8 Op. Atty. Gen. 223, 232; *People* v. *Robb*, 126 N. Y. 180, 182, 27 N. E. 267; *Robertson* v. *Coughlin*, 196 Mass. 539, 542, 82 N. E. 678; Mechem, *Public Offices and Officers* (1890) Sec. 445; Goodnow, *Principles of Administrative Law* (1905) pp. 311-312. The principle is applicable equally as one of construction of constitutions as well as of statutes. See 1 *Annals of Congress* 376, 381, 491, 492.

The Supreme Court has had occasion to point out that this specific grant of the *appointment* power is, in view of this principle, equivalent to the specific grant of the *removal* power as well. In *Myers* v. *United States*, 272 U. S. 52, the Court stated (pp. 126-127):

> In the absence of any specific provision to the contrary, the power of appointment to executive offices carries with it, as a necessary incident, the power of removal. Whether the Senate must concur in the removal is aside from the point we now are considering. That point is, that by the specific constitutional provision for appointment of executive officers with its necessary incident of removal, the power of appointment and removal is clearly provided for by the Constitution, and the legislative power of Congress in respect to both is excluded save by the specific exception as to inferior offices in the clause that follows * * *[15]

[15] The "specific exception as to inferior offices" to which the Court refers, we will have occasion to deal with later (pp. 62-65).

It should be added that whether the Senate need or can concur in a removal is also aside from the point at issue in the present case. Suffice it here to point out that the Constitution itself indicates where the removal power is vested—and that it is *not* in Congress. See also *Matter of Hennen*, 13 Pet. 230, 260.

*c. The Nature of the Grant of "the Executive Power" Indicates that the Power of Removal Was Granted to the Executive Branch.*

The Constitutional grant of power to the executive department is broad, in contrast to the grant of power to the legislative branch. Article II begins: "*The executive Power* shall be vested in a President" (italics supplied). No attempt was made to specify the range of "the executive power" in the balance of Article II; the reference to particular executive powers was simply a strengthening and confirmation of the power where that was considered necessary and appropriate. *Myers* v. *United States*, *supra*, at p. 118.

In view of the proof afforded by the provisions relating to impeachments and appointments, there is no need to elaborate on the significance to be attached to this grant in this form. A few comments, however, are justifiable.

First, it seems likely from the experience with the Articles of Confederation that the grant of "the executive power" was intended by the Framers to accord to the executive the power to appoint and to remove. Under the Articles, there was no real executive branch; Congress, in common with most of the state legislatures, drew to itself largely all of the executive powers. It had the power to appoint to many positions (Article IX) and in accordance with the principle mentioned above that the power of removal is incident to the power of appointment, it also removed its appointees. See, *e. g.*, 4 *Journals of the Continental Congress* (Lib. of Cong. ed.) 361; 13 *id.* 32-33; 14 *id.* 542, 712, 714; 18 *id.* 1085, 1115.

When, therefore the Virginia Plan introduced by Randolph provided that the executive, under the Constitution, "ought to enjoy the executive rights vested in Congress by the Confederation" (Farrand, *supra*, Vol. I, p. 21), it seems likely that the grant was intended to include the power of removal, as well as that of appointment, both of which had previously been exercised by Congress. See *Myers* v. *United States*, *supra*, at p. 110. The Virginia Plan was the Constitution in embryo. Its subsequent history, and the great compromises by which the interests of the larger and smaller states were preserved, serve only to reinforce this inference. See *id.* at pp. 110-111.

This conclusion as to the intention of the Framers is strongly supported by the action of the First Congress in modifying the Northwest Ordinance of 1787 "so as to adapt the same to the * * * Constitution." Under the Ordinance, appointments and removals were by Congress, but in the Act of August 7, 1789 (1 Stat. 50, 53) the intention was clearly expressed that the executive powers theretofore exercised by Congress were to be transferred to the President, including the power of removal. The Act provided that all officers previously appointed by Congress were henceforth to be appointed by the President, by and with the advice and consent of the Senate, and that "in all cases where the United States in Congress assembled, might, by the said ordinance, revoke any commission or remove from any office, the President is hereby declared to have the same powers of revocation and removal."

Second, it is quite clear that in 1789, as now, the power of appointment and of removal of officers was considered an executive function. See, *e. g.*, *Murphy* v. *Webster*, 131 Mass. 482, 488; Re *Opinion of the Justices*, 300 Mass. 598, 14 N. E. (2d) 465. Of course, in the British government, the executive—the Crown—had the power of appointment of executive officers, and the power of removal incident to it (see *Myers* v. *United States*, *supra*, at p. 118), which may well have been influential. *Cf.* Ex parte *Grossman*, 267 U. S.

87, 108-111; Ex parte *William Wells*, 18 How. 307. But shortly after the adoption of the Constitution, during the debates in the First Congress in 1789 (see pp. 69-70, *infra*) there were expressions which can leave no doubt as to the views of the Framers. The group which ultimately prevailed in that great debate (see p. 70, *infra*)—the group led by James Madison—urged that the natural meaning of the term "executive power" included the right to appoint and to remove.[16] Madison himself stated (1 *Annals of Congress* 463):

> The question now resolves itself into this, Is the power of displacing, an Executive power? I conceive that if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, controlling those who execute the laws. If the Constitution had not qualified the power of the President in appointing to office, by associating the Senate with him in that business, would it not be clear that he would have the right, by virtue of his executive power, to make such appointments? Should we be authorized, in defiance of that clause of the Constitution,—"The Executive power shall be vested in a President,"—to unite the Senate with the President in the appointment to office? I conceive not. If it is admitted that we should not be authorized to do this, I think it may be disputed whether we have a right to associate them in removing such persons from office, the one power being as much of an executive nature as the other * * *.

The same view was expressed in the contemporaneous debate in the Senate. All of its proceedings then were executive (the Senate did not open its doors, except on one occasion, until 1794) but the remarks of Oliver Ellsworth,

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[16] This is not to say that only the executive may appoint; of course the legislative and judicial branches select and remove many of their own officers. See, *Matter of Hennen*, 13 Pet. 230; *United States* v. *Cooper*, 20 Dist. Col. 104, 124. We do not question that Congress may directly remove its own appointees, and no such issue is here involved.

later Chief Justice, were reported by Senator William Paterson (see Bancroft, *History of the Constitution of the United States* (1881) Vol. II, p. 192):

> * * * To turn a man out of office is an exercise neither of legislative nor of judicial power; it is like a tree growing upon land that has been granted.

And as Chief Justice Taft asked in the *Myers* case (272 U. S. at pp. 117-118):

> If such appointments and removals were not an exercise of the executive power, what were they? They certainly were not the exercise of legislative or judicial power in government as usually understood.

See also *Springer* v. *Philippine Islands*, 277 U. S. 189, 202; 4 Op. Atty. Gen. 603, 609-610.

Finally, it should be pointed out that this concept of the nature of executive power is strengthened by the provision enjoining upon the executive branch the duty to "take care that the Laws be faithfully executed" (Article II, Section 3). Though the executive power is granted in Article II, to the President, he must necessarily exercise it through subordinates; the Constitution contemplates that the executive shall function, not in a straight-jacket, but through such delegation as may be necessary. *Wilcox* v. *McConnel*, 13 Pet. 498, 513; *United States* v. *Eliason*, 16 Pet. 291, 302; *Williams* v. *United States*, 1 How. 290, 297; In re *Neagle*, 135 U. S. 1, 63; *Russell Co.* v. *United States*, 261 U. S. 514, 523. The necessary implication, of course, is that the executive should have the power to choose those who are to assist in the execution of the laws, and to remove those to whom the power should no longer be delegated. See Madison, 1 *Annals of Congress* 496, 497; Ames, 1 *id.* 474; *Myers* v. *United States*, *supra*, at p. 117.

*d. The Congressional Power to "Vest" the Power of Appointment of Certain Officers Cannot be Construed as a Grant of a Removal Power.*

In the light of these various factors, we come to the consideration of the two clauses by which, if by any at all, Congress might be said to have been granted a direct power of removal. It requires no lengthy analysis to show that in neither clause has this power been conferred upon the legislative branch.

The first clause which could be advanced as granting to Congress a general removal power is that contained in Article II, Section 2, clause 2 (*supra*, p. 47) by which it is provided that the general provision for appointment by the President by and with the advice and consent of the Senate is subject to the exception that—

> * * * the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

By its express terms, of course, this is a power to "vest" another power—to determine the *location* of the power of appointment and, by the same token, the location of the power to remove such officers. See Story, *Commentaries* (5th ed. 1891) Sec. 1537. The Framers recognized that in the case of inferior officers the procedure of Senate confirmation was unnecessarily cumbersome, and that even presidential appointment was not always necessary or appropriate. This provision was the obvious solution.

But it would indeed be extreme to distill an affirmative grant of a power to remove from the simple grant of power to *vest* the power to appoint. The clause does not even grant Congress the power to vest the power of appointment in itself, or in either of its branches. *United States* v. *Ferreira*, 13 How. 40; *Shoemaker* v. *United States*, 147 U. S. 282; Story, *supra*, Sec. 1535; Willoughby, *Constitutional Law* (2d ed. 1929) Vol. III, Sec. 991; 3 Op. Atty. Gen.

188; 12 *id.* 32, 37; 13 *id.* 7[illegible]. What it *can* do is to determine, within the executive branch, and as between the executive and judicial branches where the power to appoint and remove shall be placed; it *cannot* reserve it to itself.[17]

An analogy is supplied in Article III of the Constitution. By this Article, the judicial power of the United States is to be "vested" in the Supreme Court and in such inferior courts as Congress may from time to time establish. Under that Article, Congress has proceeded to establish inferior courts, and to "vest" them with such a quantum of the Federal judicial power as it deems appropriate. *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 234. Yet, no one would argue, from the power of Congress to control the *vesting* of judicial power, that Congress may itself exercise it. In Article III, as in Article II, the power granted to Congress is solely a power to "vest," not a power to delegate some of its own powers.

But it is unnecessary to elaborate the point, for the Court has specifically answered it. In *Myers* v. *United States*, *supra*, the Court considered this clause, and stated (p. 161):

> The power to remove inferior executive officers, like that to remove superior executive officers, is an incident of the power to appoint them, and is in its nature an executive power. The authority of Congress given by the excepting clause to vest the appointment of such inferior officers in the heads of departments carries with it authority incidentally to invest the heads of departments with power to remove. It has been the practice of Congress to do so, and this Court has recognized that power. The Court also has recognized in the *Perkins* case that Congress, in committing the appointments of such inferior officers to the heads of departments, may prescribe incidental regulations controlling

[17] The Constitution, of course, expressly grants to each House of Congress the power to select its own officers, and by the same token, to remove them. Article I; Section 2, clause 5; Section 3, clause 5.

and restricting the latter in the exercise of the power of removal. *But the Court never has held, nor reasonably could hold, although it is argued to the contrary on behalf of appellant, that the excepting clause enables Congress to draw to itself, or to either branch of it, the power to remove, or the right to participate in the exercise of that power. To do this would be to go beyond the words and implications of that clause and to infringe the constitutional principle of the separation of governmental powers.* (Italics supplied.)

The *Perkins* case (*United States* v. *Perkins*, 116 U. S. 483), to which Chief Justice Taft refers, was urged by the defenders of Section 304 in the House as authority for the power there claimed, but it is plain, from the above quotation, that it has no such force. In that case, as here, the issue was raised by a suit for salary. In allowing recovery to a cadet who had been removed by the Secretary of the Navy despite a statute which forbad dismissals in peace time except after court martial, the Court of Claims said (and its language was quoted and approved by this Court, 116 U. S. at p. 485):

> We have no doubt that when Congress, by law, vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed.
>
> The head of a department has no constitutional prerogative of appointment to offices independently of the legislation of Congress, and by such legislation he must be governed, not only in making appointments but in all that is incident thereto.

There is no suggestion in the case, however—or in any other decision, for that matter—that this power to *limit* or *control* the removal power implies that any portion of it is vested in Congress, or in either of its branches. It is one thing to

*control* a power, and quite another affirmatively to exercise it, as the *Myers* case clearly points out.

But the extent to which Congress may act, in this respect, deserves somewhat more attention. Since its power under the excepting clause in Article II, Section 2, clause 2, and under the "necessary and proper" clause in Article I, Section 8, are identical, we may conveniently discuss them together.

*c. The "Necessary and Proper" Clause Cannot be Construed as a Grant of a Removal Power.*

This clause in Article I, Section 8, like that already referred to in Article II, is an affirmative grant of power to Congress. Under it, as under the other clause as construed in the *Perkins* case, *supra*, Congress undoubtedly has a very considerable power to determine many of the incidents of Federal employment. There is no warrant, however, for construing this clause as a grant to Congress of the direct power of removal.

The true basis for the interpretation of this clause has been nowhere better stated than by James Madison during the debates in the First Congress. He said, in discussing the allocation of powers made by the Constitution (1 *Annals of Congress* 581-582):

> The powers relative to officers are partly Legislative and partly Executive. The Legislature creates the office, defines the powers, limits its duration and annexes a compensation. This done, the Legislative power ceases. They ought to have nothing to do with designating the man to fill the office. That I conceive to be of an Executive nature. Although it be qualified in the Constitution, I would not extend or strain that qualification beyond the limits precisely fixed for it. We ought always to consider the Constitution with an eye to the principles upon which it was founded. In this point of view, we shall readily conclude that if the Legislature determines the powers, the honors, and emoluments of an office, we should be insecure if they

> were to designate the officer also. The nature of things restrains and confines the Legislative and Executive authorities in this respect; and hence it is that the Constitution stipulates for the independence of each branch of the Government.

Although Madison was thus delimiting the respective fields of the executive and the legislative branches with respect to the power of *appointment*, the same argument, obviously, applies to the power of removal, which is incident to the power to appoint. Indeed, at another point in the debate, Madison made his position on this clear. He answered what he had thought was an argument based on Article I, Section 8, as follows (1 *id.* 495-496):

> He seems to think (if I understand him rightly), that the power of displacing from office is subject to legislative discretion; because, it having a right to create, it may limit or modify as it thinks proper. I shall not say but at first view this doctrine may seem to have some plausability. But when I consider that the Constitution clearly intended to maintain a marked distinction between the Legislative, Executive, and Judicial powers of Government; and when I consider that if the Legislature has a power, such as is contended for, they may subject and transfer at discretion powers from one department of our Government to another; they may, on that principle, exclude the President altogether from exercising any authority in the removal of officers; they may give it to the Senate alone, or the President and Senate combined; they may vest it in the whole Congress; or they may reserve it to be exercised by this House. When I consider the consequences of this doctrine, and compare them with the true principles of the Constitution, I own that I cannot subscribe to it.

The legislative power extends, in other words, to a wide range of the incidents of offices or other positions within the sphere of federal employment. *Crenshaw* v. *United States*, 134 U. S. 99, 106. No one doubts that Congress could abolish an *office*—the office held by Dr. Lovett for example—or for that matter, the whole elaborate structure

of the Department of the Interior or the Federal Communications Commission. *Cf. Ware* v. *United States*, 4 Wall. 617. Congress could reduce the emolutions of an *office* by half or even to nothing—the equivalent of abolishing it. *Cf. Butler* v. *Pennsylvania*, 10 How. 402, 416. Congress may, likewise, determine the qualifications for an *office*, subject always to the limitation that it leave some scope for the exercise of the appointing power. *Myers* v. *United States, supra*, at p. 128; Willoughby, *supra*, Vol. III, Sec. 992; Corwin, *The President* (2d ed. rev. 1941) 70; 13 Op. Atty. Gen. 516, 520. And Congress, finally, as respects some positions, may impose limitations upon the power to remove an incumbent once duly appointed. *Humphrey's Executor* v. *United States, supra; Blake* v. *United States*, 103 U. S. 227; *Shurtleff* v. *United States*, 189 U. S. 311, 314; *Carr* v. *Gordon*, 82 Fed. 373 (C. C. N. D. Ill.); *Priddie* v. *Thompson*, 82 Fed. 186 (C. C. W. Va).[18]

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[18] The instant case in no way involves the issue decided in the *Myers* case as to the power of Congress to limit executive removals. For present purposes, it is unnecessary to determine whether limits may be imposed upon that power, or to assay the validity of the criticism of the wide sweep of the dicta in that case. See *e. g.*, Corwin, *Tenure of Office and the Removal Power Under the Constitution* (1927) 27 Col. L. Rev. 353 *et seq.* Professor Corwin himself acknowledged that his criticism of an *unlimited* power of removal did not mean that he believed that the power of removal was possessed by Congress itself. His article states (27 Col. L. Rev. p. 385):

> Thus, in consequence of the accidental circumstances that the location of the power of removal came up for decision at the very beginning of our constitutional system—*a power on all hands admitted not to belong to Congress, albeit Congress might, possibly, determine its location*—this power then and there became by the theory under discussion an independent limitation on Congress's power under the "necessary and proper clause" in the creation of offices. (Italics supplied.)

By the same token, we may accept the limitations on the executive power of removal which were imposed in *Humphrey's Executor* v. *United States*, 295 U. S. 602.

But there is no implication in any of these powers that Congress may step beyond the *office* to its *incumbent*, as Congress has done in Section 304. There can be no assertion that Section 304 changes the nature of the positions which respondents held, or the tenure or emoluments of those positions. That section dealt not with the office, but with the incumbent—the matter as to which Madison clearly stated Congress was not empowered to deal.

We submit, therefore, that a fair analysis of the Constitution can leave no doubt that Congress does not possess the power claimed for it by the most vigorous sponsors of Section 304—the general, direct power of removal. The matter is summed up by Chief Justice Taft in the *Myers* case—though he omits reference to the impeachment power, the strongest proof of our position (272 U. S. at p. 127):

> A reference of the whole power of removal to general legislation by Congress is quite out of keeping with the plan of government devised by the framers of the Constitution. It could never have been intended to leave to Congress unlimited discretion to vary fundamentally the operation of the great independent executive branch of government and thus most seriously to weaken it. It would be a delegation by the Convention to Congress of the function of defining the primary boundaries of another of the three great divisions of government. The inclusion of removals of executive officers in the executive power vested in the President by Article II, according to its usual definition, and the implication of his power of removal of such officers from the provision of section 2 expressly recognizing in him the power of their appointment, are a much more natural and appropriate source of the removing power.

B. THE PRACTICE FOR OVER 150 YEARS UNDER THE CONSTITUTION CONFIRMS THE FACT THAT CONGRESS WAS NOT GRANTED ANY GENERAL DIRECT REMOVAL POWER.

Perhaps the single most significant fact in the entire case is the fact that there is no counterpart of Section 304 in our history. Strange indeed it would be if Congress

possessed a power which had thus lain dormant for over 150 years. Much more likely is the usual presumption that a uniform course of practice under the Constitution is highly persuasive evidence of its true construction, particularly when it was affirmatively evidenced, as here (see pp. 50-52, *supra*) at a time when the Framers of the Constitution were actively participating in public affairs. *Stuart* v. *Laird*, 1 Cranch 299, 309; *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 351; *Cohens* v. *Virginia*, 6 Wheat. 264, 420; *Prigg* v. *Pennsylvania*, 16 Pet. 544, 621; *Cooley* v. *Board of Port Wardens*, 12 How. 299, 315; *Ames* v. *Kansas*, 111 U. S. 449, 463 *et seq.*; *The Laura*, 114 U. S. 411, 416; *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 297; *McPherson* v. *Blacker*, 146 U. S. 1, 28 *et seq.*; *Knowlton* v. *Moore*, 178 U. S. 41, 56; *Fairbank* v. *United States*, 181 U. S. 283, 308; Ex parte *Grossman*, 267 U. S. 87, 118; *Myers* v. *United States*, *supra*, at p. 175; *O'Donoghue* v. *United States*, 289 U. S. 516, 549-550.

The absence of any affirmative attempt to exercise such a power as is now claimed eliminates direct precedents. There are a few occasions, however, on which the power of removal has been fully discussed. They are significant largely in the negative evidence which they furnish; the failure on those occasions to assert the power now asserted is striking evidence that it does not in fact exist.

The great issue as to the removal power—the extent to which it could be *controlled* by Congress—furnished the occasions for most of the discussions, until it was settled by *Myers* v. *United States*, and *Humphreys's Executor* v. *United States*, *supra*. We have already referred to the discussion in the First Congress during the debate on the bill to create the department then known as the Department of Foreign Affairs. See *Parsons* v. *United States*, 167 U. S. 324, 328 *et seq.* As originally drafted, the bill implied that Congress was *granting* to the President a power to remove the Secretary; as amended in the House and passed by the Senate and signed by President Washington, any

such implication was removed. 1 Stat. 28. See 1 *Annals of Congress* 455, 578-585.

The debates in the House on the amendment, which extended over six days from June 16 to June 22, 1789, dealt fully with the subject of removals under the Constitution. They have been thoroughly analyzed, not only in the *Myers* case, but by the commentators on that decision. See especially Corwin, *supra*. Some of the statements there made, which declared that the impeachment power was the *sole* method of legislative removal, we have already quoted at pp. 50-51 above. The position which ultimately prevailed in that debate, however—that of Madison—denied even a power in Congress to *limit* the President's removal power, and only one person asserted that the power to create *offices* included the power to appoint and remove the *incumbents* of such offices. See footnote 14, pp 51-52, *supra*.[15]

The same issue arose again during the administration of President Jackson, precipitated by his removal of his Secretary of the Treasury, Mr. Duane, in a controversy over the United States Bank. The Senate resolution re-

[15] As analyzed by Prof. Corwin, the three major divisions of opinion were (1) those who believed the President had complete power of removal; (2) those who believed he shared it with the Senate; and (3) those who believed that the Constitution had not settled the question, and that Congress might vest the power by the "necessary and proper" clause. One or two members believed that removal could be only by impeachment. Mr. Sedgwick, the sole member who asserted a power in Congress directly to remove, was a minority member of the third group. The group led by Madison (the first stated above) prevailed, and its view was subsequently accepted as the correct construction. See Corwin, *op. cit. supra* note 18, at p. 361n; Story, *Commentaries* (5th ed. 1891), Sec. 1537-1544. There is no suggestion in any of the very scanty records of the contemporaneous Senate debate on the same bill, that any one in that body claimed that Congress, or the Senate, possessed a direct removal power. See John Adams, *Works* (1856 ed.) Vol. I, pp. 448-450; and Vol. III, pp. 408-412, which contains Adams' notes on the debate made while he was presiding in the Senate as Vice President.

questing information as to the causes for Duane's removal; was supported by Webster, Clay and Calhoun, who again asserted the power of Congress to limit the President's power to remove. Webster, for example, stated (11 *Cong. Deb.* 479):

> I think the Legislature possesses the power of regulating the condition, duration, qualification, and tenure of office, in all cases where the constitution has made no express provision on the subject.

See also Clay (*id.* at 513-524) and Calhoun (*id.* at 553-563). Again, however, there was no claim that Congress itself possessed a general removal power. Moreover, the Senate resolution was flatly rejected by President Jackson, who declared (Richardson, *Messages and Papers of the Presidents* (1909) Vol. III, p. 133):

> The President in case of this nature possesses the exclusive power of removal from office, and, under the sanctions of his official oath and of his liability to impeachment, he is bound to exercise it whenever the public welfare shall require it; if, on the other hand, from corrupt motives he abuses this power, he is exposed to the same responsibilities. On no principle known to our institutions can he be required to account for the manner in which he discharges this portion of his public duties, save only in the mode and under the forms prescribed by the Constitution.

The issue of the removal power again came to the fore in the administration of President Johnson, when the Tenure of Office Act was passed by the Reconstruction Congress. This Act, again, directly limited the President's removal power by requiring Senate approval of removals. The situation is stated in *Parsons v. United States*, 167 U. S. 324, 340:

> The President, as is well known, vetoed the tenure of office act, because he said it was unconstitutional in that it assumed to take away the power of removal constitutionally vested in the President of the United

> States—a power which had been uniformly exercised by the Executive Department of the Government from its foundation. Upon the return of the bill to Congress it was passed over the President's veto by both houses and became a law. The continued and uninterrupted practice of the Government from 1789 was thus broken in upon and changed by the passage of this act . . .

We need not trace the history of the Tenure of Office Act to the final verdict of unconstitutionality on its last remaining vestige in *Myers* v. *United States*, *supra*.[20] For present purposes, it is necessary only to state, again, that the power asserted by Congress in that Act was a power to limit and control executive removals: it was not the assertion of a legislative power to remove.

During the administration of President Cleveland, the issue as to the limits of the President's removal power was again raised by a request from the Senate that the President inform it of the reasons for certain removals. The President, in rejecting the request stated (Richardson, *Messages and Papers of the Presidents*, Vol. VIII, p. 379):

> I believe the power to remove or suspend such officials is vested in the President alone by the Constitution, which in express terms provides that "the executive power shall be vested in a President of the United States of America," and that "he shall take care that the laws be faithfully executed."
>
> The Senate belongs to the legislative branch of the Government. When the Constitution by express pro-

[20] The Act was finally repealed (except as to certain postmasters, of whom Myers was one) in the administration of President Cleveland, after the bitterness between the President and Congress which had led to its passage had been forgotten. Myers had been appointed by the President on July 21, 1917, to be a postmaster of the first class for a term of four years. After he had refused a demand that he resign, he was removed from office on February 2, 1920, by order of the Postmaster General, acting by direction of the President. In August, 1920, the President made a recess appointment of a successor. Myers sued to recover the salary for the balance of his term. His claim was denied by this Court.

> vision superadded to its legislative duties the right to advise and consent to appointments to office, and to sit as a court of impeachment, is conferred upon that body all the control and regulation of Executive action supposed to be necessary for the safety of the people; and this express and special grant of such extraordinary powers, not in any way related to or growing out of general Senatorial duties, and in itself a departure from the general plan of our Government, should be held, under a familiar maxim of construction, to exclude every other right of interference with Executive functions.

The decisions of the courts have, for the most part, considered the power of removal from the same aspect—the extent to which the executive power of removal may be limited by the legislature. In many cases, over a long period, this Court has considered this problem. Almost all of them are collected in *Myers* v. *United States*, *supra*. In none of them, however, so far as we are aware, has it even been argued that Congress has a general power of removal—save only in the *Myers* case, where it was expressly denied.[21] See pp. 63-64, *supra*. The *Myers* and *Humphrey's* cases, taken together, may be deemed to settle the question as to the limitations which Congress may impose on executive removals; but at the same time, they must also be taken to determine that no general removal power has been granted to Congress. In the *Humphrey's* case, a member of the Federal Trade Commission had been appointed in 1931 for a term of seven years. On October 7, 1933, the President

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[21] In *Wood* v. *United States*, 107 U. S. 414, the Court considered a statute which reduced the retirement pay of certain Army officers. The plaintiff's theory, *inter alia*, was that the act of Congress had in effect removed him from the office of major general and put him in that of colonel. Both the lower court and this Court clearly implied that Congress was without authority to effect such a removal, although his claim was rejected on the ground that the change was not in his office, but in his rank. The Court stated (p. 417): "Such rank not being an office, Congress could change his rank, and with it his pay."

following Humphrey's refusal to resign, undertook to remove him from office without assigning any of the reasons for removal specified in the statute. Suit was brought for salary due from October 8, 1933, to February 14, 1934, the date of Humphrey's death. Upon certificate from the Court of Claims, the Court held that the President's power of removal was limited to removals for statutory reasons, and allowed recovery. There is no hint in the opinion, however, that Congress itself has a direct removal power. Of the decision in the *Myers* case Mr. Justice Sutherland states (295 U. S. at pp. 627-628):

> The actual decision in the *Myers* case finds support in the theory that such an officer is merely one of the units in the executive department and, hence, inherently subject to the *exclusive* and illimitable power of removal by the Chief Executive, whose subordinate and aid he is. Putting aside *dicta* * * * the necessary reach of the decision goes far enough to include all purely executive officers. (Italics supplied.)

The *Humphrey's* decision is summed up in the following sentence (295 U. S. at p. 629):

> The authority of Congress, in creating quasi-legislative of quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime.

The same comment is applicable to the opinions of the Attorneys General. In the main, they, too, dealt with the same issue—the controllability of the executive removal power. Undeniably, however, the opinions implicitly deny a direct legislative removal power. See 4 Op. Atty. Gen. 1, 603, 610; 8 *id.* 223; 12 *id.* 32, 41, 421; 30 *id.* 79, 83. *Cf.* Willoughby, *supra*, Vol. III, Secs. 995, 999.

There remain to be mentioned the two exceptions of which we are aware to the above recitation. The first concerns

the Comptroller General. As originally passed by Congress in 1920, the bill creating this office provided that the incumbent could be removed only by impeachment or by concurrent resolution of both houses of Congress. The bill was vetoed by President Wilson, who stated (*Cong. Rec.*, Vol. 59, pp. 8609-8610):

> * * * It has, I think, always been the accepted construction of the Constitution that the power to appoint officers of this kind carries with it, as an incident, the power to remove. I am convinced that the Congress is without constitutional power to limit the appointing power and its incident, the power of removal derived from the Constitution.
>
> The section referred to not only forbids the Executive to remove these officers but undertakes to empower the Congress by a concurrent resolution, to remove an officer appointed by the President with the advice and consent of the Senate. I can find in the Constitution no warrant for the exercise of this power by the Congress. There is certainly no express authority conferred, and I am unable to see that authority for the exercise of this power is implied in any express grant of power. On the contrary, I think its exercise is clearly negatived by section 2 of Article II. That section, after providing that certain enumerated officers and all officers whose appointments are not otherwise provided for shall be appointed by the President, with the advice and consent of the Senate, provides that the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments. It would have been within the constitutional power of the Congress, in creating these offices, to have vested the power of appointment in the President alone, in the President with the advice and consent of the Senate, or even in the head of a department. Regarding as I do the power of removal from office as an essential incident to the appointing power, I can not escape the conclusion that the vesting of this power of removal in the Congress is unconstitutional and therefore I am unable to approve the bill.

The veto was sustained, but in the next Congress the bill, modified to provide for removal by impeachment or joint resolution, was passed and signed by President Harding. Act of June 10, 1921, 42 Stat. 26.

There may be warrant for rejecting the argument made by President Wilson—as applied to this particular office. The Comptroller General—recognized now as a quasi-legislative officer, the "watchdog" for Congress—is a lineal descendant of the British Comptroller and Auditor General "who holds his office during good behaviour, with a salary paid by statute directly out of the Consolidated Fund, and who considers himself in no sense a servant of the Treasury, but an officer responsible to the House of Commons." Lowell, *Government of England* (1908) Vol. I, p. 289.[22] As such, it may be consistent with the Constitution to provide for legislative removal. The Comptroller General, or his predecessors in the same type of office, have been regarded even since the days of Articles of Confederation as occupying a unique position. See Ordinance of September 26, 1778; Act of September 2, 1789, 1 Stat. 65; Act of March 3, 1817, 3 Stat. 366; Act of July 31, 1894, 28 Stat. 162, 205. Madison, in the First Congress in debating the Act of September 2, 1789, *supra*, himself recognized that the Comptroller's office exercised a peculiar blend of governmental powers, and was therefore properly subject to greater control by the legislative branch. See 1 *Annals of Congress* 611-612, 614. The same recognition is accorded him in an early opinion by Attorney General Wirt. 1 Op. Atty. Gen. 629. And see also Hamilton, *Works* (1904 ed.) Vol. VIII, p. 548; Taft, *Our Chief Magistrate and His Powers* (1916) pp. 81, 125-126.

No similar justification can be advanced for the other exception—the provision in Section 4(f) of the Tennessee Valley Authority Act providing for removal of members

[22] It was this practical argument which was emphasized by those who attempted, unsuccessfully, to override President Wilson's veto. See, *e. g.*, *Cong. Rec.*, Vol. 59, p. 8613.

of the Authority by concurrent resolution. Act of May 18, 1933, 48 Stat. 58; U. S. C., Title 16, Sec. 831c(f).[23] We venture to suggest that this provision is probably unconstitutional. It does not appear from the legislative history of the statute that any consideration whatever was given to Section 4(f) in the reports of either the Senate or the House, or in the debates upon the bill. Indeed, the origin of the provision, and the possible motivation for it, are completely obscure. See *Note*, 51 Harv. L. Rev. 1246; S. Rep. No. 23, 73d Cong., 1st Sess. (1933); H. Rep. No. 130, 73d Cong., 1st Sess. (1933). In *Morgan* v. *Tennessee Valley Authority*, 115 F. (2d) 990 (C. C. A. 6th), *certiorari denied*, 312 U. S. 701, a member of the T. V. A. who had been removed by the President brought suit, contending that Section 4(f) evidenced an intention of Congress that members could be removed *only* by Congress. The Court refused to construe the section as vesting in Congress the *sole* power of discretionary removals, since there was no clear attempt in the statute to negative the President's power. No more was necessary for the decision, but the Court added (115 F. (2d) at p. 993):

> Finally, it must be said that if § 4(f) is to be given the construction now urged for it, doubt exists as to its constitutional validity. Springer v. Philippine Islands, 277 U. S. 189; * * * Myers v. United States, supra. We are not required to resolve the doubt * * *.

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We conclude, therefore, that there is no basis for the claim with which we have thus far dealt—that Congress was a "hiring and firing agency", and could remove the incumbent of practically any position in the Government whenever it wished to do so. There remains to consider whether Congress possesses a more limited direct power of

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[23] The act reads as follows: "* * * * *Provided*, That any member of said board may be removed from office at any time by a concurrent resolution of the Senate and the House of Representatives."

,removal, as suggested by Mr. Keefe, *supra* pp. 42-43, *i. e.*, a power directly to remove *employees*. To that we now turn. We believe it equally clear that Congress does not possess even that limited removal power, and that, in addition, it is immaterial here whether it does or does not because respondents are not employees in any event.

### 1. Congress does not possess even a restricted power of direct removal which would enable it to remove these respondents.

Mr. Keefe and others in the House asserted that even if Congress did not have a general direct removal power, it had at least a power directly to remove respondents, because, it was asserted, respondents were *employees*, not *officers*, of the United States. The contention has two answers: first, Congress has no more power directly to remove employees than it has to remove officers; and second, respondents are, in any event, officers and not employees.

#### *a. Congress Possesses No Power Directly to Remove "Employees" as Distinguished from "Officers."*

Neither Mr. Keefe nor anyone else in the House elaborated on this alleged distinction between officers and employees so far as a removal power of Congress is concerned. We are, therefore, unaware of the alleged basis for it. Moreover, we are frankly unaware of any basis which affords it the slightest support. Special counsel for Congress, in his *amicus* brief in the court below, did not advert to the distinction except to point out that, as respects employees, Congress may impose certain limits on the executive power of removal.

So far as the power of Congress is concerned, there is no doubt that the general source of the Constitutional power which Congress exercises in providing for the creation of "offices" and "non-offices" (for lack of a better term) is the same—the "necessary and proper" clause in Article I,

Section 8. There are a few offices which are created by the Constitution itself—the President, Vice President, Senators and Representatives, and the like—*but in all other cases* the offices owe their existence to legislation passed to implement the general grants of power over various subject-matters contained in Article I. In some instances, the statute may mention the office by name, or provide for a specific assignment of specific duties; in others, it may permit the same effect to be accomplished by executive or judicial allocation of functions. The extent to which Congress itself may be said to create offices and non-offices depends entirely on the extent to which it may wish to blueprint the administrative machinery, and may vary widely from time to time and statute to statute. And, of course, even where there has been no extensive legislative blueprinting, the annual appropriation acts afford Congress a considerable measure of *de facto* control over both offices and non-offices in the administrative set-up. See Macmahon, A. W., *Congressional Oversight of Administration: The Power of the Purse* (1943) 48 Pol. Sci. Quart. 161, 380.

But since the source of the power over "offices" and "non-offices" is identical, there is no basis for an argument that the Congress possesses a greater power of direct removal of "non-officers" than of "officers". Certainly Congress is possessed of full power to determine the emoluments of every Government position (subject to the minor constitutional exceptions), whether the position be an office or a non-office, and whether it be one created by a statute or by the statutory authority delegated to another person or agency. Similarly, the power of Congress to determine qualifications for the officer and for the employee are equal, as is its power to fix a tenure and impose limits and conditions on the power of removal of each. Nothing which Congress may do in either direction, as outlined in the *Myers* and *Humphrey's* cases, is dependent upon a distinction between officers and non-officers.

The powers of Congress with respect to the non-office *position* thus is no greater than its power with respect to the

office *position*. That being so, there is no reason to suppose that the power of Congress directly to remove the *incumbent* of one position is greater or less than its power to remove the incumbent of another position. The identity of Congressional power over officers and non-officers in every other respect compels the same identity as to the Congressional power of direct removal—it does not exist. It is fair to state that as to every item of proof that Congress does not have a general direct power of removal, the same item applies with equal or greater force to show that Congress does not have a limited power of direct removal over employees.[24] On the language of the Constitution, on authority, on precedent and on principle, Congress can have no more power to remove, for example, a minor employee of the Bureau of Labor Statistics than it has to remove the Secretary of Labor.

The absence of any basis for distinguishing between a power in Congress to remove officials and a power to remove employees is further illustrated by the diverse nature of the positions which are held by "officers". Article II, Section 2, clause 2 of the Constitution declares that the President shall, by and with the advice and consent of the Senate, appoint various particular officers—

> and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

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[24] It is possible that the power of Congress directly to remove non-officers is even more restricted than its power to remove officers. The Congressional power of impeachment extends to "civil officers" (Article II, Section 4). We need not determine, now, the extent to which that provision limits the impeachment power (see footnote 25a, page 81, *infra*), but to the extent that it prevents the impeachment of non-officers it indicates an intention on the part of the Framers that Congress should have nothing whatever to do with the direct removal of non-officer Government personnel.

Under this clause, it has uniformly been held that persons appointed by the President, the Courts of Law, or the Heads of Departments are "officers" of the United States. *United States* v. *Hartwell*, 6 Wall. (U. S.) 385, 393-394; *United States* v. *Mouat*, 124 U. S. 303, 307; *United States* v. *Smith*, 124 U. S. 525, 532; *McGrath* v. *United States*, 275 Fed. 294, 300 (C. C. A. 2d), *appeal dismissed* 260 U. S. 709; *Hoeppel* v. *United States*, 85 F. (2d) 237, 241 (App. D. C.); *Callahan* v. *United States*, 122 F. (2d) 216, 218 (App. D. C.). Conversely, persons not so appointed have been held to be not officers. *United States* v. *Germaine*, 99 U. S. 508.[25]

There is no doubt, of course, that the word as used in various statutes, and the word as used at various places in the Constitution, is not always to be accorded the same meaning. *Callahan* v. *United States*, *supra*; *Hendee* v. *United States*, 22 C. Cl. 134.[25a] Indeed, it is not clear that

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[25] If the argument be made that the word "officer" (even when called an "inferior" officer) connotes something more distinguished or important, it should be remembered that in 1789 the size of the Federal Government was very small. When the Government moved to the District of Columbia in 1801, the largest "Department" was the Treasury, and its total staff was less than 25 persons. In the debates in 1789, for example, Mr. Smith of South Carolina stated: "The inferior officers mentioned in the Constitution are clerks and other subordinate persons." (1 *Annals of Congress* 372.) See also Story, *op. cit. supra* note 19, at Sec. 1536.

[25a] A member of Congress, for example, seems to be not a civil "officer" under Article II, Section 4 relating to impeachments. 17 Op. Atty. Gen. 419; see also Blount's impeachment, July 1797 to January 1798 (Wharton, *State Trials* (1859) p. 200) apparently decided by reference to the specific provision in Art. VII, Sec. 3, empowering each house to determine qualification of its own members and also on the theory that to be a "civil officer of the United States" one must represent the nation as a whole. Nevertheless a member of Congress is an officer under a criminal statute against impersonation. *Lamar* v. *United States*, 241 U. S. 103. The authorities vary on whether a territorial judge is a "civil officer" under Article II, Section 4. Compare 3 Op. Atty. Gen. 409, 411, with 5 *id.* 288, 290-291, and *Reagan* v. *United States*, 182 U. S. 419, 424.

the word has the same meaning at every place in the Constitution; Article I, Section 3, clause 7, for example, which provides that the judgment in cases of impeachment may extend to "disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States", is obviously intended to have a broad application, broader than that intended in Article II, Section 2, clause 2 quoted above. Nor is it clear, in the present case, in exactly what context the word "officer" was used by the members of the House who urged the distinction between "officers" and "employees" as respects the alleged Congressional power of direct removal. Suffice it here to point out, however, that under the limited power of direct removal claimed for Congress which we are now considering, it could not remove, because they are "officers", a postal clerk (*Foshay* v. *United States*, 54 F. (2d) 668 (S. D. N. Y.)), or a mail carrier (*Waddle* v. *Hughes*, 260 Ky. 269, 84 S. W. (2d) 75)), or a penal guard (*Baskins* v. *United States*, 32 F. Supp. 518 (E. D. S. Car.) or an investigator of the Alcohol Tax Unit (*Brown* v. *Zerbst*, 99 F. (2d) 745 (C. C. A. 5th)) or any employee of the customs service (*Callahan* v. *United States*, 122 F. (2d) 216 (App. D. C.))—excluding, of course, those appointed before 1923 (*United States* v. *Smith*, 124 U. S. 525). Any argument which requires such results obviously cannot be accepted as a proper construction of the Constitution. The only possible conclusion is that no such alleged exception exists.

*b. Respondents, in Any Event, Are Not "Employees."*

The second, and alternative, answer to the claim that Congress may directly remove "employees" is that respondents, in any event, are "officers", and hence beyond the scope of the asserted power.

There can be no doubt whatever as to the validity of this answer so far as respondent Lovett is concerned. At the time that Section 304 was passed (*i. e.*, at the time that

the power of Congress to remove was asserted) he was the Government Secretary for the Virgin Islands, an office to which he was appointed by the President pursuant to Section 21 of the Organic Act of the Virgin Islands (Act of June 22, 1936, 49 Stat. 1807; 1812 U. S. C., Title 48, Sec. 1405t). And on November 15, 1943, when the inhibition of Section 304 became operative, he occupied the office of Executive Assistant to the Governor, having been appointed to that office by the Secretary of the Interior pursuant to Section 23 of the same Act (R. 19). In each position all of the requirements of an office were fulfilled. Appointment by the President or the Secretary of the Interior alone would be enough (see cases cited p. 81, *supra*) but in addition it is plain that in each office his position satisfied all of the requisites of an "office", as defined by the Supreme Court in *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 520:

> An office is a public station conferred by the appointment of government. The term embraces the idea of tenure, duration, emolument and duties fixed by law.

Dr. Lovett's positions had tenure and duration; as Government Secretary, presumably at the pleasure of the President, since no other tenure was specified, and as Executive Assistant pursuant to the provision that "The officers appointed by the Secretary of the Interior shall hold office during his pleasure." Both had emoluments. Both had duties fixed by law; the Act, in Section 21, specifies the duties of the Government Secretary, and Order No. 1870, issued by the Secretary of the Interior pursuant to Section 23 of the Act specifies the duties of the Executive Assistant. In each case, he took an oath of office (R. 19).

Although it is admittedly more doubtful, we submit that this alternative argument is also available to respondents Watson and Dodd. They were not, it is true, appointed by the Head of a Department, in the sense that those words are used, for example, in the opinion in *United States* v. *Germaine*, 99 U. S. 508. They were appointed by the Fed-

eral Communications Commission pursuant to the authority delegated in Section 4(f) of the Federal Communications Act of 1934 (Act of June 19, 1934, 48 Stat. 1067; U. S. C., Title 47, Sec. 154(f)) (R. 24, 49).

When the decision in *United States* v. *Germaine* was announced, in 1878, the executive branch of the government was then divided into seven so-called departments under which were grouped the various bureaus and offices. The first of the great independent establishments as we now have them—the Civil Service Commission—was not established until several years later. It was wholly proper in 1878 to state that the constitutional phrase "Heads of Departments" referred to the seven major branches, and also to hold that it did not refer to chiefs of bureaus or offices within those departments. *Cf. United States* v. *Germaine, supra; United States* v. *Mouat*, 124 U. S. 303. But it is quite a different matter to state that the independent establishments which now exist are not "Departments". As Mr. Justice Holmes said in *Towne* v. *Eisner*, 245 U. S. 418, 425:

> A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.

Certainly there is no magic requirement that the word "Department" itself be used in naming the establishment—an establishment does not have to be *called* a Department to be within the constitutional language. The Constitution deals with substance, not words. In 1933, the Attorney General held, for example, that the Civil Service Commission was a "Department" in the sense of the word as used in the Constitution (37 Op. Atty. Gen. 227), and that the three members who constitute the Commission are the "head of a department" in the same sense. In *Emergency Fleet Corp.* v. *Western Union Telegraph Co.*, 275 U. S. 415, 418, 426, the Supreme Court enumerated the various independent establishments then existing and termed them

"minor independent departments". See also 40 Op. Atty. Gen. Nos. 73, 74.

At the present time, therefore, we believe that it may be said to be proper to term the Federal Communications Commission a "department", and the seven members of the Commission the "head of a department", in the sense that the words are used in Article II, Section 2, clause 2, of the Constitution. We concede that in one case the contrary result has been reached. *United States* ex rel. *Crow* v. *Mitchell*, 89 F. (2d) 805, 808 (App. D. C.). If plaintiffs Watson and Dodd occupy positions which meet the other normal attributes of an "office", we submit that they, too, are "officers".

And it is plain that they do. Unquestionably, of course, the positions had tenure. Dr. Watson had been in the position of Chief of the Analysis Division, Foreign Broadcast Intelligence Service, since November 16, 1941 (R. 24); Mr. Dodd had been Assistant News Editor, Foreign Broadcast Intelligence Service, since December 22, 1942 (R. 29). Since the statute under which they were appointed prescribed no fixed term of years for their positions, they presumably held office at the will of the Commission. Certainly, however, they did not hold positions the temporary nature of which would prevent them from becoming an officer. *Cf.*, *United States* v. *Hartwell*, 73 U. S. 385; *United States* v. *Germaine*, 99 U. S. 508, 511; *Helvering* v. *Powers*, 293 U. S. 214, 224.

Unquestionably, too, the positions held by these plaintiffs had emoluments, fixed by the authority of the Commission (R. 24, 29). Moreover, they had fixed and specified duties, which were carefully and fully specified in their respective Civil Service Commission classification sheets. Each of them took an oath of office (R. 24, 29). They occupied positions, in other words, which in every respect comply with the charactgristics of "offices", as that term is usually known and commonly defined. See *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 520.

We submit, therefore, that this alternative answer to the assertion of the more limited power of Congressional removal is likewise available to respondents Watson and Dodd. Again, however, we should emphasize that this is but an *alternative* answer; the fundamental answer—that Congress possesses no such power—applies with full and equal effect to all three respondents.

*c. The Nature of the Federal Communications Commission Does Not Afford Congress Any Power to Remove Its Personnel.*

One further fact remains to be considered in connection with respondents Watson and Dodd, namely, the nature of the Federal Communications Commission itself as an agency possessing quasi-judicial and quasi-legislative powers. Although we believe that this fact is wholly irrelevant—indeed, it was not mentioned in the Congressional debate—we deem it wise to discuss it briefly.

In *Humphrey's Executor* v. *United States*, *supra*, the Supreme Court held that the "illimitable" power of removal of the executive over all purely executive officers, which it had affirmed in the *Myers* case, was not similarly "illimitable" in the case of a Federal Trade Commissioner. The Federal Trade Commission, the Court stated, was (295 U. S. at p. 628):

> * * * an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive.

The Interstate Commerce Commission seems likewise to have been regarded by the Supreme Court as being in the same category. See 295 U. S. 602, 629.

We may assume, for present purposes, that the principle applied in the *Humphrey's* case to a Commissioner of the

Federal Trade Commission would likewise apply to a Commissioner of the Federal Communications Commission. The Federal Communications Commission may be, and has been, requested by Congress under Section 4(k) to make reports in aid of legislation (U. S. C., Title 47, Sec. 154(k)).[27] It holds hearings and renders decisions on various matters of public interest, convenience, and necessity, some of which are enforceable and reviewable collaterally, and some by direct appeal to the Court of Appeals of the District of Columbia (U. S. C., Title 47, Secs. 401, 402).[28] And see *United States* ex rel. *Crow* v. *Mitchell*, 89 F. (2d) 805 (App. D. C.).

That assumption, however, does not indicate in any way that Congress possesses a power to remove a member of the Federal Trade Commission. The *Humphrey's* case, assuming its full applicability, established only that Congress had a power to *limit* and *control* the *executive power* of removal in the case of such agencies. The Court said, in summing up its conclusion (295 U. S. at p. 629):

> The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime.

The power of Congress here, in other words, is no greater than its power over inferior officers and other Government personnel; it may give to a position a certain degree of stability by limitations on and control over the executive

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[27] See, *e. g.*, Public Res. No. 8, 74th Cong., 49 Stat. 43, and the Report, H. Doc. No. 340, 76th Cong., 1st Sess. (1939).

[28] Indeed, there are many of the Interstate Commerce Commission procedures which have been made expressly applicable to the Federal Communications Commission. See, *e. g.*, Sec. 402(a), 48 Stat. 1093.

power of removal. But, just as in the case of such personnel, the power to deal with the office, and the power to deal with the incumbent, are necessarily wholly different matters. In the case of these minor independent departments of the Government, Congress has, simply, more power over the office than it has in the major departments; but in neither does its power extend to the incumbent of any position.

There is nothing strange or unusual in all this. The Federal Trade Commission, as the Supreme Court says in the *Humphrey's* case, exercises a combination of powers, both quasi-legislative and quasi-judicial. Congress may protect its members against interference by the executive through unrestricted removals, to the extent that it regards such protection as necessary and proper. The Commissioners are, of course, officers of the United States, being appointed by the President, by and with the advice and consent of the Senate, and they may be removed by Congress in the constitutional manner, by impeachment. Particularly to the extent that they exercise quasi-judicial functions, every reason which militates against an unrestrictable *executive* power of removal also militates with equal force against an unrestrictable legislative power of removal,[29] except, of course, by the impeachment process.

Hence, it is fair to conclude that even as to the Commissioners of the Federal Communications Commission, as to whom the *Humphrey's* case is presumably applicable, Congress has no power of removal. But in addition to that, it is fairly clear that respondents Watson and Dodd do not fall within the *Humphrey's* case at all; they are engaged solely in the performance of executive functions. As to them, the alleged Congressional power of removal is just as non-existent as it is for a postmaster.

Both of these plaintiffs were engaged in work for the Foreign Broadcast Intelligence Service, as the titles of

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[29] Legislative power of removal, if it existed at all, would of course be unrestrictable, since no matter what limitations were imposed, they could be removed by subsequent Congresses.

their positions shows (R. 24, 29). What is war work—analysis of foreign broadcast propaganda. The work of the Foreign Broadcast Intelligence Service (of which both were a part) was to analyze foreign "radio broadcasts emanating from foreign countries to determine the probable trends of the war and the internal morale and conditions of foreign nations." The contacts of the personnel so engaged were not with legislative or judicial bodies, but with executive agencies, such as the Office of Facts and Figures and the Coordinator of Information (both later merged in the Office of War Information), the Coordinator of Inter-American Affairs, the State Department, the Military and Naval Intelligence, Lend-Lease, the Department of Justice, and others. See *Seventh Annual Report, Federal Communications Commission* (1941) pp. 1-6.

Respondents Watson and Dodd, in other words, are in quite a different position from that occupied by Mr. Humphrey, or by the Commissioners of the Federal Communications Commission. The Federal Communications Commission certainly exercises, at least in these times and in these connections, executive powers, and these two respondents are engaged wholly in that phase of the Commission's work.

With respect to these two respondents, therefore, we submit that they must be considered as in no different position from Dr. Lovett, who is in an undeniably executive office in an undeniably executive department.

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We believe that it is clear from the foregoing that Congress does not possess any power of direct removal, either broad or narrow in scope. We turn, then, to the last question—may Congress create for itself a power otherwise lacking by a misuse of its power to appropriate.

### B. CONGRESS MAY NOT EXERCISE A POWER OF REMOVAL OTHERWISE DENIED IT BY A MISUSE OF THE APPROPRIATING POWER.

The most extreme position advanced by the supporters of Section 304 was that Congress may do *anything* it wishes in the way of appropriating or refusing to appropriate. This seems to have been the position of Special Counsel for Congress in the court below. Under this view, the proof thus far adduced under Part A, *supra*, pp. 42-89, is immaterial; Congress does not need a direct power of removal to be able to effect removals through appropriation measures. We believe that this position, too, is without foundation. The appropriation power of Congress *does* have constitutional limitations, and the limitations have patently been exceeded in this case.

#### 1. THE POWER OF CONGRESS TO APPROPRIATE, LIKE ALL OTHER OF ITS POWERS, IS SUBJECT TO CONSTITUTIONAL LIMITATIONS.

The power of Congress to appropriate stems from Article 1, Section 8, clause 1 of the Constitution, which provides:

> The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; * * * [30]

There is no need now to revive the ancient debate over the meaning of the "general welfare" clause. After long controversy, its meaning was finally determined in *United States* v. *Butler*, 297 U. S. 1, and that decision has been accepted as conclusive. *Charles C. Steward Machine Co.* v. *Davis*, 301 U. S. 548, 587; *Helvering* v. *Davis*, 301 U. S. 619, 640. Under the *Butler* case, Congress may tax and spend

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[30] There is also the provision in Article I, Section 9, clause 7: "No Money shall be drawn from the Treasury, but in Consequence of Appropriation made by Law", and the provision in Article IV, Section 3, clause 2: "The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

for the "general welfare", and this latter phrase is not limited to the powers enumerated in Article I, Section 8. The views long advocated by Justice Story have been approved. Story, *supra*, Ch. XIV.

We do not contend, therefore, that the power of Congress to appropriate is limited to the very matters over which Congress has specific power to act. Congress may, and has, raised money by taxes, and appropriated it, for the relief of distress due to domestic and foreign catastrophes, for public health, for education, for the advancement of science and the arts, for social welfare, for industry and agriculture, and the like. No one can now deny that it may do so, or not do so, as it wishes.

On the other hand, there is nothing in this power to appropriate for "the general welfare" which in any degree indicates that appropriations may be made a device whereby the constitutional limits imposed upon Congress can be destroyed, or the government established by the Constitution be subverted, and made wholly subservient to the legislative branch. There is no simple rule to the effect that because Congress has a power specifically granted by the Constitution it may therefore exercise it without restraint. All of the powers which Congress has are powers which are delegated to it, yet all of these powers are granted subject to the limitations imposed by the Constitution. In *Linder* v. *United States*, 268 U. S. 5, the Court stated (p. 17):

> Congress can not, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within power reserved to the States, is invalid and cannot be enforced.

Similarly, in *McCulloch* v. *Maryland*, 4 Wheat. 317, Chief Justice Marshall stated (p. 423):

> * * * should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.

And in *Fairbank* v. *United States*, 181 U. S. 283, a federal stamp tax on foreign bills of lading was held unconstitutional as violating the constitutional prohibition against taxes on articles exported. The Court, referring to *Almy* v. *California*, 24 How. 169, holding a stamp tax by a State on bills of lading on gold shipped out of the State to be unconstitutional, said (p. 294):

> In other words, that decision affirms the great principle that what cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result.

Again, in *Pollock* v. *Farmer's Loan & Trust Co.*, 157 U. S. 429, the Court stated (p. 581):

> If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution. * * *. But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls, as has indeed been established by repeated decisions of this court.

In each of these cases, Congress was dealing with the power to tax—a power just as expressly granted as the power to appropriate. In each case, the Court made it clear that it could not and would not accept the principle that a granted power was limited only by the self-restraint of the legislature. The principle which the Court *has* accepted, and to which it has consistently adhered, is that laid down long ago in *McCulloch* v. *Maryland*, *supra*, at p. 421:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

But the point does not require further elaboration. No one can reasonably deny that all powers granted by the Constitution—whether to Congress, to the President, or to the courts—must be exercised in a way which, to use the language of Chief Justice Marshall, "consist with the letter and spirit of the constitution". The power to tax, for example, is a broad power—a power to tax "for the general welfare". The discretion of Congress with respect to the objects of taxation, the amount of taxation, the exemption from taxation, and all of the other incidents of tax laws is of the widest possible scope. No one can doubt that by tax laws Congress may influence many policies which it could not directly affect; and that the tax laws are nonetheless constitutional. *Cf., Veazie Bank* v. *Fenno;* 8 Wall. 533; *McCray* v. *United States,* 195 U. S. 27; *Magnano Co.* v. *Hamilton,* 292 U. S. 40. Similarly, the power of Congress over interstate and foreign commerce is broad and sweeping, and its exercise may affect many intrastate matters, yet the exercise of the power is nonetheless constitutional. *Cf., The Minnesota Rate Cases,* 230 U. S. 352; *Shreveport Rate Case,* 234 U. S. 342; *University of Illinois* v. *United States,* 289 U. S. 48.

Notwithstanding these sweeping grants of power, and notwithstanding the collateral consequences which may legitimately flow from their exercise, no one has seriously doubted that they have limits. The power to tax, for example, which is closely related to the power to appropriate (both of them granted by the same clause) has been restricted when it was believed that it was being used—misused—to regulate and control matters not within the scope of the powers of Congress. See, *e. g., Child Labor Tax Case;* 259 U. S. 20; *Hill* v. *Wallace,* 259 U. S. 44; *Linder* v. *United States,* 268

U. S. 5, 17; *United States* v. *Constantine*, 296 U. S. 287. *Cf. Nigro* v. *United States*, 276 U. S. 332, 353 (1928).[31] In these cases, Congress has declared that the taxing power may not be used to obliterate the States, in violation of the Tenth Amendment. And there can be no question that a tax which had the purpose and necessary effect of violating any other constitutional guarantee would likewise fail; certainly no one would consider valid a tax which violated the First Amendment by imposing rates on Episcopalians treble those imposed on others, for example.

The point was made by the Court in *Veazie Bank* v. *Fenno*, *supra*. After noting that the grant of the power to tax is in general, sweeping terms—indeed that "More comprehensive words could not have been used" (*id.* p. 540)—the Court continued (*id.* p. 541):

> There are, indeed, certain virtual limitations, arising from the principles of the Constitution itself. It would undoubtedly be an abuse of the power if so exercised as to impair the separate existence and independent self-government of the States, or if exercised for ends inconsistent with the limited grants of power in the Constitution.

The answer must likewise be the same when we are considering the power of appropriation. See *Gibbons* v. *Ogden*, 9 Wheat. 1, 199; Story, *supra*, Secs. 922, 978. Like the taxing power, it is wide in scope. The objects of appropriation, like the objects of taxation, are subject to the wide discretion of Congress. The amount to be appropriated, like the amount to be raised by a tax, is a matter with which Congress is peculiarly empowered to deal. Yet there is no more reason to suppose that the power to appropriate can be exercised without regard to constitutional limitation than that the power to tax may be so exercised.

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[31] In *Grosjean* v. *American Press Co.*, 297 U. S. 233, the Court likewise struck down a purported exercise of the state taxing power which it believed was designed to deny rights guaranteed by the First Amendment.

Each must always remain subject to the fundamental guarantees of the Constitution. *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308, 313.

We do not mean, of course, that the motives and purposes of Congress can be searched out in every case and employed to invalidate an appropriation. If the appropriation, valid on its face, is calculated or even intended to accomplish moral, social, or economic ends, as well as to advance the general welfare, we fully agree that the courts cannot speculate on what induced Congress to select the particular object of appropriation, or its amount. *Cf. Pacific Fisheries* v. *Alaska*, 269 U. S. 269, 277; *Sonzinsky* v. *United States*, 300 U. S. 506. But when Congress inserts in an appropriation act a provision explainable only as the means to accomplish a forbidden end, we believe that Congress exceeds its powers, and that the courts may, indeed must, act. This is precisely what this Court decided as to another rider on another appropriation act in *United States* v. *Klein*, 13 Wall. 128. There Congress, though purporting to prescribe regulations as to the appellate jurisdiction of this Court in fact prescribed a rule of decision on certain cases. In declaring the rider unconstitutional the Court said (p. 145):

> But the language of the proviso plainly shows that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have.

As Mr. Justice Holmes said in *Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426, 434:

> But it has been held a great many times that the most absolute-seeming rights are qualified and in some circumstances become wrong. One of the most frequently recurring instances is when the so-called right is used as part of a scheme to accomplish a forbidden result.

The body of precedents dealing directly with the power of appropriation is not, of course, large. *Massachusetts* v. *Mellon*, 262 U. S. 447, and *Frothingham* v. *Mellon*, 262 U. S. 447, make judicial review of the appropriating power highly unlikely. However, in *United States* v. *Butler*, 297 U. S. 1, in which the Court regarded the tax and the appropriation as so inseparable as to enable a taxpayer to question the appropriation, the Supreme Court struck down the appropriation contained in the original Agricultural Adjustment Act because it was inconsistent with the Tenth Amendment. Unquestionably, in that case, Congress had exercised the power of appropriation. Yet since it did not, in the language of *McCulloch* v. *Maryland*, *supra*, "consist with the letter and spirit of the constitution", it was held bad. The Tenth Amendment, in other words, could not be avoided by the device of a conditional appropriation.

A few years earlier a similar problem was presented to Attorney General Mitchell. He stated (37 Op. Atty. Gen. 56, 61):

> This proviso cannot be sustained on the theory that it is a proper condition attached to an appropriation. Congress holds the purse strings, and it may grant or withhold appropriations as it chooses, and when making an appropriation may direct the purposes to which the appropriation shall be devoted and impose conditions in respect to its use, provided always that the conditions do not require operation of the Government in a way forbidden by the Constitution. Congress may not, by conditions attached to appropriations, provide for a discharge of the functions of Government in a manner not authorized by the Constitution. * * * It might make appropriations on condition that the executive department abrogate its functions. It might, for example, appropriate money for the War Department on condition that the direction of military operations should be conducted by some person designated by the Congress, thus requiring the President to abdicate his functions as Commander in Chief.

Mansfield, *The Comptroller General* (1939), p. 78, is to the same effect:

> It must be conceded at once that the sanction of withholding appropriations—an absolute power—might be used to secure an unconstitutional result. Should Congress, for example repeal existing laws on the subject and appropriate for the salaries of the President and the Supreme Court less than they have been receiving, they would have no legal means of getting their usual pay despite the plain mandate that their compensation "shall not be diminished." So also, if Congress made the appropriations for all governmental expenditures conditional upon the Comptroller General's prior approval of these, it is hard to see how payments could legally be made otherwise. But the absolute quality of the appropriating power does not extend—as against a challenge from the other two branches of government—beyond the sanction for its enforcement, the withholding of appropriations. The executive is at liberty to treat a condition as unconstitutional if it is prepared also to forego the appropriation to which it is attached; and the courts might conceivably go further, for they have claimed that separability is ultimately a judicial question.

These views are unquestionably correct. An absolutely unlimited power to appropriate, free from every restraint, could easily be used to destroy our whole system of government, and every guarantee of civil liberties which we have. The Court, in *United States* v. *Butler*, *supra*, cited another illustration. Agreeing that Congress could appropriate money in aid of education, the Court said (297 U. S. at p. 74):

> But an appropriation to an educational institution which by its terms is to become available only if the beneficiary enters into a contract to teach doctrines subversive of the Constitution is clearly bad. An affirmance of the authority of Congress so to condition the expenditure of an appropriation would tend to nullify all constitutional limitations upon legislative power.

Nor must we necessarily agree with the majority in the *Butler* case to reach this result. The dissenting opinion of Mr. Justice Stone, no less than the majority opinion of Mr. Justice Roberts, recognizes that the power to tax and spend are powers limited by the remainder of the Constitution. They disagreed on whether the nation-wide relief of agricultural distress was a matter properly within the scope of the "general welfare" clause. Mr. Justice Stone, dissenting, said (297 U. S. at p. 87):

> The power to tax and spend is not without constitutional restraints. One restriction is that the purpose must be truly national. Another is that it may not be used to coerce action left to state control.

And, had the issue in the case been one other than the Tenth Amendment, Mr. Justice Stone would undoubtedly have added that still another is that it may not be used to destroy the fundamental constitutional framework of our Government.

One further illustration may be made. In 1860 Congress, in providing for an appropriation to complete the Washington Aqueduct, prescribed that it should be expended under the supervision of Captain Meigs. In a special message to the House, President Buchanan stated (Richardson, *supra*, Vol. V, p. 598):

> I deemed it impossible that Congress could have intended to interfere with the clear right of the President to command the Army and to order its officers to any duty he might deem most expedient for the public interest. If they could withdraw an officer from the command of the President and select him for the performance of an executive duty, they might upon the same principle annex to an appropriation to carry on a war a condition requiring it not to be used for the defense of the country unless a particular person of its own selection should command the Army.

But the examples of what might be done under a power of Congress to appropriate free from all restraint are limited only by one's imagination. No money shall be used

to pay Secretary Wallace, or Mr. Justice Murphy, or Senator Barkley, or any person who voted for Dewey, or any Catholic.[32] No money shall be paid to any Supreme Court Justice unless the decision in *Smith* v. *Jones* is rendered in favor of Smith. No money shall be paid the State Department until Russian recognition is withdrawn. That is not to say that such measures are likely. We agree, with Mr. Justice Stone, that "Courts are not the only agency of government that must be assumed to have a capacity to govern". *United States* v. *Butler*, *supra*, at p. 87. What we do say, however, is that nothing in the Constitution, and nothing in our practice under it, can lead to the conclusion that if such acts as these were attempted, the courts would stand aside. On the contrary, as in every other case where the legislature, or the executive, has sought to exercise a granted power to achieve a forbidden result, the courts would, and should, strike them down.

### 2. Section 304 is an unconstitutional use of the appropriating power.

There finally remains to show, of course, that Section 304 is such a misuse of the appropriating power. We think unquestionably it is, because it is an assertion of the power to remove executive employees and to destroy the independence of the executive department.

No one can really doubt that the power to remove a man from his position is tantamount to the power to control the manner in which the affairs of that position will be exercised. We need go no further than the Constitution itself,

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[32] Article VI of the Constitution states: "* * * but no religious Test shall ever be required as a Qualification to any office or public Trust under the United States." Could it be argued that in the face of that provision (reenforced by the First Amendment) Congress could validly appropriate with a proviso that no part of the appropriation should be used to pay the salary of any Catholic?

and its provisions for life tenure of judges, to see that there has been no doubt of that principle since the earliest times in our history. Indeed, one of the plaints of the Declaration of Independence declared that the King had "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." See also, *The Federalist* (Hamilton) Nos. 78, 79; *Evans* v. *Gore*, 253 U. S. 245. But the same principle is equally applicable to non-judicial positions. In denying an unrestrained power in the President to remove a member of the Federal Trade Commission, the Court said in *Humphrey's Executor* v. *United States, supra*, at p. 629:

> For it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will.

And at a later point in the opinion (p. 630):

> The power of removal here claimed for the President falls within this principle, since its coercive influence threatens the independence of a commission * * *.

In the great debate of 1789 (pp. 69-70, *supra*), in which the removal power was in issue, Madison noted the same principle (1 *Annals of Congress* 581):

> * * * if there is a principle in our Constitution, indeed in any free Constitution, more sacred than another, it is that which separates the Legislative, Executive and Judicial powers. *If there is any point in which the separation of the Legislative and Executive powers ought to be maintained with great caution, it is that which relates to officers and offices.* (Italics supplied.)

If, therefore, we are to have a Government with three great and independent branches, it is impossible to accord to one of the branches an unrestrained power to remove the incumbents of the various positions in the coordinate branches beyond that envisaged by the impeachment provisions of the Constitution itself. The power here asserted

—the power so to appropriate as to effect removals from office—would make of the Congress the overwhelmingly dominant force, and would make of the executive and judicial branches mere appendages to the legislature. For there is no distinction possible, on principle or on any other basis, between the power to remove these plaintiffs, and the power to remove in a similar fashion the Secretary of State whose foreign policy fails to accord with the views of Congress, or a federal district judge in California, or the very member of the Federal Trade Commission whose independence was emphasized in the *Humphrey's* case.

No one doubts, of course, that Congress does possess a great power to determine the form of the Government, and the extent to which it will or will not exercise the powers committed to it by the Constitution. No one doubts that Congress may determine to a large extent the scope of executive and even judicial duties, and the instrumentalities by which the executive and judicial powers shall become effective. No one doubts that Congress could abolish the State Department, or the Circuit Courts of Appeal, or any other position not created by the Constitution. But that is emphatically *not* to say that, once having created these agencies, Congress may also say *how* the executive and judicial powers shall be administered.

Here, for example, Congress could, unquestionably, have abolished the Department of the Interior, or the Government of the Virgin Islands, or the Federal Communications Commission. But it did not do that. It did not in any degree affect the work which the Department of the Interior or the Federal Communications Commission were required to do under the statutes. Here, Congress attacked the *incumbent* of the office—asserting a power not only to establish the mechanisms by which the Government should be carried on, but also *how it should be exercised.* That, without a shadow of a doubt, is beyond the pale; that, if it is

possible, means the end of an independent executive department.[33]

In *State* ex rel. *Tolerton* v. *Gordon*, 236 Mo. 142, 139 S. W. 403, in which a similar attempt to force the ouster of an executive official was condemned, the Court stated the same point (139 S. W. at p. 410):

> If in the discharge of a duty imposed both by the Constitution and by the law the executive has exercised his prerogative by appointing to the office of game and fish commissioner a person who in his judgment is faithfully performing his official duty, is it within the power of the Legislature to review the action of the executive and paralyze it by providing in an appropriation act that such appointee shall not receive compensation for his services in such office, although any other person may? If so, then the Legislature may designate, in an appropriation act for the payment of salaries, those who shall and those who shall not be entitled to compensation thereunder, and thus hamper the executive, not only in the exercise of the appointing power, but also in carrying out the mandate of the organic law in taking care that the laws are faithfully executed. Under the authorities cited it is clear that such power has not been granted to the lawmaking branch of the government. The Legislature has the undoubted power to make or to refuse to make an appropriation authorized by the Constitution, and it has the power to create or abolish an office when unrestrained by constitutional limitations, but it has not the power to say who shall not be compensated out of an appropriation for the payment for official services rendered, nor to say indirectly who shall be appointed to or removed from the office thus created.

Justice Graves, concurring, also stated the same point (*id.* p. 413):

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[33] Cf. *United States* v. *Klein*, 13 Wall. 128; *State* ex rel. *Worrell* v. *Carr*, 129 Ind. 44; *Reid* v. *Smoulter*, 128 Pa. St. 324; *People* ex rel. *Burley* v. *Howland*, 155 N. Y. 270.

> In this case the Legislature determined that their game laws should be enforced. They determined that the appropriation should be made, but to that appropriation they tack on a proviso, which strikes at the powers of another department. In the body of the bill the appropriation is made, but by the proviso they undertake to say to the Governor there is one man whom you cannot select to enforce these laws. This we think, under our own holdings, is beyond their power.

Here, in the same way, Congress has *not* determined that there should be no Executive Assistant to the Governor of the Virgin Islands, nor that there should be no Foreign Broadcast Intelligence Service. Presumably, it could have determined that either or both should have been abolished. But instead it has here stated that the offices were to be continued, the work was to continue, the appropriation was available, *but these plaintiffs cannot do that work, or any other work, for this Government.*

Indeed, we believe that Section 304, in its provision for permanent disqualification of plaintiffs from gainful Government employment, is equally an interference with the appointing power of the executive—and by the same token, with the confirmation power of the Senate on executive nominations—and would be equally unconstitutional if plaintiffs had not been officers of the Government at the time the bill was passed. Congress has broad powers, of course, in prescribing qualifications for office, as we have already stated (pp. 66-68, *supra*). But the power to prescribe qualifications certainly cannot fairly be said to extend to the point where Congress may say that irrespective of qualifications, A, B, and C, can never be utilized by the executive, or by the judiciary, or by any other agency of the United States, to carry out their functions. It is no answer to assert that the disqualification of three people is *de minimis;* that there are still so many millions left that the interference with the power to appoint is unimportant. One need only see that a rider like this could also say that there shall be perpetual disqualification for everyone who

voted for Norman Thomas, or Wendell Wilkie, or who held any position in the first Roosevelt Administration. With no variation from the *principle* asserted in Section 304, Congress could nullify a full and free exercise of the appointing power.

### 3. The history of similar riders in Congress also condemns Section 304.

In times of stress, when feelings run high and emotions tend to supplant reason and sober judgment, it is not surprising to find that things are done which would not be done, or even thought of, during more normal times. A brief reference to the few other occasions in our history when riders aimed at particular individuals have been attempted will show that in the past, with one exception, even when passions were sufficiently inflamed to suggest resort to this course of legislation, sound judgment and cooler heads have prevailed, and the proposals have been defeated. None of these riders, it should be noted, was in any sense as drastic and sweeping as Section 304; none of them sought to limit more than the funds contained in the appropriation bill to which it was attached.

We do not urge, of course, that Congress has, in those instances voted on the matter solely on the issue of its power to act. The merits of the particular controversy are inevitably intertwined with the issue of constitutional authority, and no one can say, in any case, which consideration swayed the vote. We do believe, however, that the almost unanimous rejection of the far less drastic riders, coupled with the vigorous and effective arguments advanced against the existence of the power thus to misuse the appropriation power, are highly significant in indicating that the power does not exist.

Events such as this do not lend themselves to easy classification in indices of congressional proceedings. Hence we are not able to say with certainty that there are not other

riders which might be added to this list. If so, we can be relatively certain that they were unsuccessful attempts, for no one, in the course of the debates on Section 304, or in the comments on it since, or in this litigation, has adduced any simila. legislation at any time in our history.

In 1924, the War Department Appropriation Bill (H. R. 7877) contained this proviso: "*Provided*, That no part of this sum shall be paid to Major Charles C. Cresson, United States Army." Major Cresson had, somewhat earlier, presided over the Army court martial of Col. Hunt, who was allegedly responsible for the escape of Grover Cleveland Bergdoll—a court martial which had resulted in the acquittal of Col. Hunt. A motion to strike this proviso (*Cong. Rec.*, Vol. 65, p. 5031) resulted in considerable debate during which the principle of the proviso was mercilessly attacked both on the basis urged in this Point, and also on the ground that the provision was a bill of attainder. See, *e.g.*, Mr. Stengle of New York (*id.* p. 5032); Mr. Wurzbach of Texas (*id.* p. 4744); Mr. Tucker of Virginia (*id.* p. 5033). The proviso was stricken by a vote of 158 to 10 (*id.* p. 5036).

On the same day, a similar proviso was considered which would have denied any appropriation to Col. Hunt (*id.* p. 5041). Again, the attack was on fundamental grounds. See, *e.g.*, Mr. Newton of Minnesota (*id.* p. 5042). That proviso, too, was stricken by a vote of 47 to 21 (*id.* p. 5043).

The next instance arose in regard to the Interior Department Appropriation Bill for the year ending June 30, 1940 (H. R. 4852). The Senate Appropriations Committee added an amendment (*Cong. Rec.*, Vol. 84, p. 4308):

> *Provided*, That no part of this appropriation shall be available for the payment of the salary of the present Superintendent of the Great Smoky Mountain National Park.

Again the proposed amendment was attacked on constitutional grounds. See, *e.g.*, Senator Schwartz of Wyoming

(*id.* p. 4312); Senator Taft of Ohio (*id.* p. 4342). The amendment was defeated by a vote of 31 to 28 (*id.* p. 4346).

In March 1941, and again in June, Mr. David Lasser had been the object of bitter attacks in the House. See *Cong. Rec.*, Vol. 87, pp. 2540, 2596, 4959. In June, during a debate on the Emergency Relief Appropriation Bill for the year ending June 30, 1942, an amendment was offered (*id.* p. 5110):

> *Provided further*, That no part of any appropriations contained in this act shall be used to pay the compensation of David Lasser.

After some discussion on the amendment, and attacks against its principle (see, *e.g.*, *id.* p. 5111), it was agreed to by a vote of 131 to 88 (*id.* p. 5113). Some two weeks later, in further debates, the amendment was again attacked. See Voorhis of California, *id.* p. 5515; Flannagan of Virginia, *id.* p. A2984. The bill was passed, however, with the rider, and became law in that form. 55 Stat. 396.

Later the House Appropriations Committee became convinced that the proviso had worked a serious injustice, and included in the National Defense Supplemental Appropriation Bill (H. R. 6159) a section repealing the proviso. See H. Rep. No. 1470, 77th Cong., 1st Sess., pp. 38-39. However, the point of order that this was legislation in an appropriation bill was made in the House, and no opportunity was afforded for a vote. See *Cong. Rec.*, Vol. 87, pp. 9493-9494.

This proviso, it is fair to state, we think was also unconstitutional, though it is far less drastic than Section 304. It applied only to the money appropriated by one act, and was therefore not a permanent ban on gainful Government employment, as is Section 304. As stated by Mr. Hobbs of Alabama in the debate on Section 304 (*Cong. Rec.*, Vol. 89, p. 4598):

> The fact that Congress adopted the method of removal now proposed in the case of David Lasser, neither

changes the Constitution nor justifies the procedure. One wrong never justifies another.

In May, 1941, Dr. Ruth Gruber came under similar attack, and an amendment was offerred to the Interior Department Appropriation Bill that "No part of the funds appropriated in this Act shall be paid to Dr. Ruth Gruber" (*Cong. Rec.*, Vol. 87, p. 4072). Again an attack was made on the principle of the amendment, but it was agreed to by a vote of 64 to 49 (*id.* p. 4073). In the Senate, however, the Appropriations Committee eliminated the clause, and the action was approved without discussion (*id.* p. 4677).

In November, 1942, the Committee on Agriculture of the House reported out a bill to aid agriculture in Puerto Rico (H. R. 7505), with the addition of the following clause (see H. Rep. No. 2641, 77th Cong., 2d Sess., p. 1):

> Any appropriation made pursuant to this Act shall be conditioned that the funds shall not become available at any time during the service of the present Governor of Puerto Rico.

There was no debate on the bill, and it died in that Congress.

Finally, in the Independent Offices Appropriation Bill for 1943 (H. R. 6430) the House had attached a proviso directed against Dr. Watson, one of the present respondents, as follows (*Cong. Rec.*, Vol. 88, p. 3997):

> *Provided*, That no part of any appropriation contained in this Act shall be used to pay the compensation of Goodwin Watson.

Senator Barkley moved to strike it in the Senate (*id.* p. 3997), again asserting the fundamental constitutional objection to such riders. He stated (pp. 3997, 3998, 4001):

> It seems to me that it is brutal and arbitrary to undertake to legislate a man out of office by providing that out of the appropriation he shall not be paid a salary. The appointment of men to public office is an executive,

function, not a legislative function, and the whole history of Congress, with one or two exceptions, indicates that it has frowned upon provisions of this kind which are, in fact, bills of attainder; that is what they amount to.

* * * * * *

The provision we are considering is not a Senate committee provision, it is a House provision, adopted by the House, which has time and again refused to do any such thing. One of the ablest speeches ever made against an amendment of that sort was made by Henry St. George Tucker, one of the great constitutional lawyers of the United States, as the Senator from Missouri will testify, who was a stickler for the Constitution. He interpreted such an attempt, in language which I think no one could misunderstand, as a bill of attainder. It is simply a legislative effort to punish a man without giving him a trial.

* * * * * *

It is not the function of Congress to appoint men or dismiss them, but we are asked to exercise an executive function by providing that out of all the thousands of Government employees, here is a man we are going to dismiss, and we are asked to dismiss him by providing that he cannot draw his pay. The Chairman of the Commission under which he works testifies in behalf of this man.

* * * * * *

If this principle were to be included as a part of our legislative policy, it would be necessary only to get a sufficient number of votes to add a proviso, in the appropriation for the payment of our judiciary, that the Chief Justice of the United States should not be paid out of the appropriation, if a majority of the Members of the House and Senate disagreed with some opinions he might have rendered as Chief Justice, or the way in which he presides over the Supreme Court. We might legislate him out of office merely by refusing to pay him. It seems to me that the ramifications, implications, and possibilities of this sort of legislation ought not to be encouraged.

See also the remarks by Senators Clark of Missouri (*id.* p. 3997), Taft of Ohio (*id.* p. 3997-3998), Murdock of Utah (*id.*

p. 4000), Danaher of Connecticut (*id.* p. 4001), and Hill of Alabama (*ibid.*).

Senator Barkley's motion to strike the amendment was agreed to (*id.* p. 4004).[34]

In summary, it is fair to conclude that Congress has itself usually recognized the dangers inherent in the practice of which Section 304 is the result. Only in the case of Mr. Lasser has a provision even remotely resembling this section received Congressional approval, and in that case the ban, though equally dangerous, was far less sweeping and less drastic than Section 304. The Congressional practice can fairly be summed up in the words of Senator Barkley (*Cong. Rec.*, Vol. 88, p. 3997):

> I could cite a number of cases where the House of Representatives have undertaken to deny the right of a man to hold an executive position by taking his pay away from him, in an effort to perform an executive function by firing a man by a legislative bill of attainder; but until this was done in this particular bill, the House of Representatives has almost uniformly frowned upon that practice, and has defeated the efforts when they were made.

4. THE CONDITIONAL NATURE OF SECTION 304 DOES NOT CHANGE THE RESULT.

Section 304, in the form in which it was finally adopted, contained the provisions which made the ban on the use of any appropriations to pay these respondents effective on November 15, 1943 (the Act is dated July 12, 1943)—

[34] See also the debates on Section 304 itself, in which the same points were made with equal vigor: Mr. Celler of New York (*Cong. Rec.*, Vol. 89, p. 4546); Mr. Ford of California (*id.* p. 4549); Mr. Folger of North Carolina (*id.* p. 4547), Mr. Coffee of Washington (*id.* pp. 4547-4548, 4587-4588), Mr. Hobbs of Alabama (*id.* pp. 4598, 5514-5517). In the Senate, the debate was likewise opposed to Section 304 on principle. Senator Barkley reiterated the position he had taken earlier on the Watson rider (*supra*, pp. 107-108) (see *id.* p. 6693), and several other Senators joined in expressing their disapproval.

> * * * unless prior to such date such person has been appointed by the President, by and with the advice and consent of the Senate * * *.

See pp. 2-3, 22, *supra*. This clause does not avoid any of the constitutional difficulties with which we have already dealt.

When we assume, as we must, that the removal of respondents by legislative action is an unconstitutional interference with the executive department, there is no essential difference presented by a provision which makes the removal conditioned upon further action by the President and the Senate. In either case, the Congress is purporting to deal with the incumbent of an office, and to subject the executive branch to a new condition without which the incumbent may not remain. In either case, the power of the executive department over the personnel of its offices is seriously curtailed. In either case, Congress is assuming a power which it does not in fact possess—a power to remove Government personnel. The condition, in this case, is no more than the manner in which Congress has chosen to exercise this alleged power. If the power did exist, it could be exercised absolutely, or on any condition which Congress might choose to impose—unanimous Senate consent, for example, or unanimous consent of both Houses, or any of others which may readily be imagined. But since the power does not exist, the attempt to palliate the consequences of its exercise by this escape device cannot change in any way the fact that Congress is assuming a power which it does not possess.

Actually, this is far more of an interference with the executive than the provision held void in the *Myers* case—that the Senate must concur in removals. In that case, the legislative limitations on the executive power did not operate until the executive himself wished to eliminate the incumbent, and in most cases the approval of the removal was accomplished by the approval of a new nominee for the position. Here however, Congress asserts that it may initiate

removals, and make that initiation effective unless the President and the Senate affirmatively step in to prevent it.

This is not a *limitation* on removals, in other words, but an affirmative act of legislative removal. If the former is an unconstitutional interference with the executive, as held in the *Myers* case, certainly this far more sweeping provision is likewise such an interference. Nor, because it is not a limitation on removals, can it obtain any support from the decision in *Humphey's Executor* v. *United States*, 295 U. S. 602.

Nor, finally, is this analogous to the impeachment process. Certainly this is not justifiable as the equivalent of impeachment. Here, the man is, in effect, presumed guilty, since he is to be removed unless he is affirmatively approved, while in impeachment he is removed only if he is first found guilty. Here, he has no benefit of the two-thirds rule in impeachment; a simple majority can accomplish his ouster. Here he has no benefit of a trial; he may be voted down five minutes after his name is submitted, with no opportunity to defend himself; in impeachment proceedings, he has a full and fair trial at the bar of the Senate. The differences could be elaborated, but enough has been said to show how far removed the operation of the section is from impeachment, and by the same token, how much farther it permits the legislative department to control the other branches of the Government than the Framers contemplated in the provision for impeachment.

It scarcely needs to be said that this is not the equivalent of imposing upon a position the requirement of Senate confirmation, although this was urged by *Amicus* in the court below as an analogy in support of Section 304. The office of Executive Assistant to the Governor of the Virgin Islands does not now require Senate confirmation of the incumbent, nor do the offices held by Watson and Dodd. We need not inquire whether they could be made such, because it is plain that nothing like that has been done. It is three *indiriduals* who were made liable to Senate approval, or else be forever ousted.

We submit, therefore, that Section 304 must be stricken down as an unconstitutional attempt to exercise a power which Congress does not possess—the power to remove and to prevent the return to Government employment of the three respondents. On this ground, alone, respondents are entitled to recover.

## III

### Section 304 is Unconstitutional as a Bill of Attainder.

The second fundamental objection to Section 304 is that it is a bill of attainder within the meaning of the prohibition in Article I, Section 9, clause 3 of the Constitution. The permanent disability for any future gainful Government employment of respondents falls plainly within this ban—and this without regard to any official status which respondents had at the time of its enactment, or to their unlawful removal from that status, with which we have dealt in Point II, *supra*. Both Judge Madden (R. 46) and Judge Whittaker (R. 41-42) held Section 304 invalid on this ground.

#### *A. THE CONSTITUTIONAL PROVISION INVOLVED.*

Article I, Section 9, clause 3 of the Constitution imposes a categorical and unequivocal limitation on the powers of Congress:

> No bill of attainder or ex post facto law shall be passed.[35]

Bills of attainder, within the meaning of this provision, have had their classic definition in the cases of *Cummings* v. *Missouri*, 4 Wall. 277, and Ex parte *Garland*, 4 Wall. 333, *infra*, pp. 116-121. Before passing to those decisions, however, it will be worth noting the constitutional background of this clause. The unanimity with which it was agreed to emphasizes the abhorrence with which such legislative acts

[35] A similar prohibition against action by the States is contained in Article I, Section 10, clause 1.

were regarded. It emphasizes, too, the need that the clause be liberally construed to accomplish the determination of the Framers that any recourse to such legislation should be prevented for all time.

The Framers were thoroughly familiar with the subject with which they were dealing. Earlier and contemporaneous writings, not only by the men who drafted the Constitution, but also by authorities whose works were widely known at the time to American lawyers and statesmen, show an intimate appreciation of this and related parliamentary machinery. *The Federalist*, Nos. 44 (Madison), 65, 66, 78 (Hamilton), 84 (Madison) (1802 ed.) Vol. I, p. 296, Vol. II, pp. 121, 128, 211, 266; Blackstone, *Commentaries* (3d ed. 1884 Bk. I, p. *46, Bk. IV, pp. *259 *et seq.*; Coke, *Fourth Institute* (1809 ed.) pp. 14, 36-39; Wooddeson, *Law Lectures: A Systematical View of the Laws of England* (1792) Nos. 40 and 41; *DeLolme on the Constitution* (1838 ed.) Vol. I (Stephens Intro.) pp. 347, 401, 449, Vol. II (DeLolme) pp. 603-607; Hale, *Jurisdiction of the House of Lords or Parliament* (1796 ed.) Ch. XVI; Comyns, Sir John, *A Digest of the Laws of England* (4th ed. 1793) Vol. V, "Parliament" H6 and L18-46. See, also, *Reasonableness of Parliamentary Proceedings by Attainders, Banishments, Pains and Penalties in Cases of High Treason* (printed by T. Payne, 1723) and West, Richard, *A Discourse Concerning Treasons and Bills of Attainder* (1716). Indeed, there were not only English,[36] but Colonial precedents as well,

[36] The latest of the English acts had been passed early in the century. The Duke of Ormond, and other Tory leaders under Queen Anne, were first impeached in the House of Peers by the Whig House of Commons. The accused failed to answer and fled, whereupon the Commons brought bills of attainder against them in 1715. See *Reasonableness of Parliamentary Proceedings by Attainder, &c.* (1723) pp. 45 *et seq.* See, also, note 44, *infra*. Sir Francis Atterbury, Bishop of Rochester, had been deprived of all his ecclesiastical offices and incapacitated to hold civil office by a bill of pains and penalties passed in 1722. 9 Geo. I, c. 17; Howell, *State Trials*, Vol. XVI, 644.

for such bills had been used in America during the colonial period and in many of the states during and after the Revolution. Story, *Commentaries on the Constitution* (5th ed. 1891) Sec. 1373; Adams, *Constitutional History of England* (Schuyler rev. 1934) p. 229; Cooley, *Principles of Constitutional Law* (3d ed. 1898) p. 311; Pound, Roscoe, *Justice According to Law: Part III-Legislative Justice* (1914) 14 Col. L. Rev. 1, 2; Thompson, James Westfall, *Anti-Loyalist Legislation during the American Revolution* (1908) 3 Ill. L. Rev. 81, 147.[37] They were not prohibited by the Articles of Confederation.

The abhorrence with which these legislative trials and punishments were viewed was expressed on all sides, as wholly unworthy of a free government.[38] See, *e.g., The Federalist*, Nos. 44, 84; Wooddeson, *supra*, No. 41; Blackstone,

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[37] American cases dealing with the effects of acts of attainder were numerous. See, *e. g., James's Claim*, 1 Dall. 47 (Pa. Sup. Ct.); *Respublica* v. *Gordon*, 1 Dall. 233 (Pa. Sup. Ct.); *Pemberton's Lessee* v. *Hicks*, 3 Dall. 479 (Pa. Sup. Ct.); *Ware* v. *Hylton*, 3 Dall. 199, and *Cooper* v. *Telfair*, 4 Dall. 14 (Georgia act of attainder passed before Federal Constitution adopted); *Inglis* v. *Sailors' Snug Harbor*, 3 Pet. 99; *Carver* v. *Astor*, 4 Pet. 1; *Sleight* v. *Kane*, 2 Johns. 236 (N. Y.), and *Jackson* v. *Sands*, 2 Johns. 267 (N. Y.) (under New York Act of Attainder and Banishment of 1779, I Greenleaf's Laws N. Y. 26); *Thompson* v. *Carr*, 5 N. H. 510. *Cf. Respublica* v. *Doan*, 1 Dall. 86, 89, 93 (Pa. Sup. Ct.) (outlawry by judicial proceedings compared with bill of attainder). Watson, *Constitution of the United States* (1910) Vol. I, p. 735n, reproduces a bill of attainder prepared by Jefferson and passed by the legislature of Virginia.

[38] John Jay had written Governor Clinton of New York from Spain in 1780, on hearing of a New York bill of pains and penalties (imposing banishment and forfeiture) passed in 1779. "If truly printed," he wrote, "New York is disgraced by injustice too palpable to admit even of palliation." Jay, *Correspondence and Public Papers* (1890) Vol. I, p. 315. See, also, John C. Hamilton, *History of the Republic of the United States* (based on writings of Alexander Hamilton and his contemporaries) (1859) Vol. III, pp. 23 *et seq.*

*supra*, Bk. I, pp. *46, *136. See, also, opinions of Justices Chase and Paterson (one of the Framers) in *Calder* v. *Bull*, 3 Dall. 386, 388, 395 (1798). There was not so much as a word to question the desirability of excepting them from the legislative powers delegated to Congress by the Constitution. Farrand, *Records of the Federal Convention of 1787* (1934) Vol. II, pp. 376, 448, 571, 596, 610, 656; Elliot, *Debates* (1845) Vol. I, p. 311, Vol. V (Madison's Diary), pp. 462-463, 545; Meigs, *Growth of the Constitution* (1924), pp. 182 *et seq.*[39] This silence, in the Convention, and in the ratification debates, reflects an informed appreciation of the simple purpose of the interdiction: there were to be no punishments administered by an aggressive or angry legislature, with or without acquiescence by the executive.

For present purposes, it is probably unnecessary to discuss the distinction between bills of attainder and *ex post facto* laws. A legislative act which itself inflicts punishment—a bill of attainder—necessarily operates on past facts, and for that reason the essential similarity of the

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[39] The single recorded opinion as to this prohibition against either federal or state action appears in Madison's Diary. On the introduction, late in the Convention, of the proposed clause limiting the federal legislature, Madison reports (Elliot, *Debates* (1845) Vol. V, pp. 462-463):

> Mr. *Gerry* urged the necessity of this prohibition, which, he said, was greater in the national than the state legislature; because, the number of members in the former being fewer, they were on that account the more to be feared.
>
> Mr. *Gouverneur Morris* thought the precaution as to *ex post facto laws unnecessary*, but essential as to bills of attainder.
>
> Mr. *Ellsworth* contended, that there was no lawyer, no civilian, who would not say that *ex post facto* laws were void of themselves. It cannot, then, be necessary to prohibit them.
>
> * * * *
>
> The question being divided, the first part of the motion, relating to bills of attainder, was agreed to, *n. m. con.*

See also Farrand, *Records*, Vol. II, p. 376, Vol. III, p. 165.

two prohibitions is manifest. Earlier cases did not attempt to separate the two categories. *E.g.*, *Calder* v. *Bull*, *supra*; *Fletcher* v. *Peck*, 6 Cranch 87. In the *Cummings* case, however, the Court held the test oaths there involved to be unconstitutional on both grounds: as bills of attainder because they were legislative acts which inflicted punishwithout judicial trial (see 4 Wall. at pp. 323, 377), and as *ex post facto* laws because they rendered acts punishable in a manner in which they were not punishable when they were committed (see *id.* pp. 326, 377). Perhaps it is fair to say that under the definition of *ex post facto* laws in the *Cummings* and other cases, bills of attainder comprise those *ex post facto* laws which the legislature itself, by the purported exercise of judicial power, assumes to make operative. We shall confine our discussion to bills of attainder, since we believe that Section 304 falls within the ban on even this more limited classification, though it should not be forgotten that the constitutional inhibition extends equally to all *ex post facto* laws.

### *B. SECTION 304 IS A BILL OF ATTAINDER, AS THAT TERM HAS BEEN DEFINED AND APPLIED BY THE COURT.*

The leading cases on bills of attainder are, of course, *Cummings* v. *Missouri*, 4 Wall. 277, and Ex parte *Garland*, 4 Wall. 333. The *Cummings* case involved the validity of a provision of the Missouri Reconstruction Constitution which made an Oath of Loyalty a prerequisite to the holding of any office under the Constitution, to the practice of many professions, and to the holding of many private offices. The Oath of Loyalty, which was specified in the Constitution, required avowal that the person taking it had never been in armed hostility to the United States, nor had ever, by act or word, manifested adherence to the enemies of the United States, nor sympathy with those rebelling against it, nor had harbored, aided or countenanced any person so engaged, and the like. Cummings, a Catholic priest, was convicted of

preaching without having taken the test oath. His conviction was set aside by this Court.

The *Garland* case involved a similar test oath prescribed by an Act of Congress passed in July, 1862 (12 Stat. 502), and extended in 1865 to embrace attorneys and counsellors of the courts of the United States (13 Stat. 424). In March, 1865, the rules of this Court relating to the qualification for practice were amended to include the new oath. Garland, an attorney admitted to practice in the Court in 1861, petitioned the Court in July, 1865, for permission to continue to practice as an attorney and counsellor. The petition was granted, and the amended rule rescinded.

In the *Cummings* case, in holding the test oath provision void as a bill of attainder, the Court defined that phrase as follows (4 Wall. at p. 323):

> "A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties.

That definition is an accurate statement of the law and practice known to English and early American legislative bodies. Blackstone, *supra*, Bk. IV, p. *259; Wooddeson, *supra*, No. 41; Anson, *Law and Custom of the Constitution* (5th ed. 1922) Vol. I, p. 381, 388; *Calder* v. *Bull*, *supra*, at p. 388; Story, *supra*, Secs. 1344, 1373; Cooley, *supra*, pp. 310-312; Pomery, *Introduction to Constitutional Law in the United States* (1875 ed.) p. 319. Other cases have not modified it or limited it. See Ex parte *Garland*, *supra*; *Drehman* v. *Stifle*, 8 Wall. 595, 601; *Pierce* v. *Carskadon*, 16 Wall. 234.[40]

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[40] There have been many lower court and state cases to the same effect, *e. g.*, *Jackson* v. *Sands*, 2 Johns. 267, 272 (N. Y.) (Kent, J.); *In the Matter of Dorsey*, 7 Porter 293 (Ala.); *Gaines* v. *Buford*, 1 Dana 481 (Ky.); *Martin* v. *Snowden*, 18 Gratt. 100 (Va.); *Yong Sung Hee*, 36 Fed. 437 (C. C. Ore.).

Under that definition, the vice of Section 304 is manifest. It becomes even more apparent as the elements of that definition, and its application in the *Cummings* and *Garland* cases, are examined in detail.

1. THE SUBSTANCE, NOT THE FORM, OF THE STATUTE, CONTROLS.

Here, as elsewhere in the Constitution, we are dealing with the *substance* of things, not with their *form*. See pp. 91-94, *supra*. The *Cummings* case itself furnishes an example. In that case, the argument of the State attempted to avoid, on technical grounds, an application of the analogous clause applicable to the States. It pointed out that the test oath provision did not on its face define any crime, assert guilt of named or readily ascertainable individuals, or purport to impose any punishment directly—as did bills of attainder at common (parliamentary) law. The Court categorically rejected any such narrow and restrictive view of the Constitutional prohibition.[41] The statement warrants full quotation (4 Wall. at pp. 324-325, 329):

> If the clauses of the second article of the constitution of Missouri, to which we have referred, had in terms declared that Mr. Cummings was guilty, or should be held guilty, of having been in armed hostility to the United States, or of having entered that State to avoid being enrolled or drafted into the military service of the United States, and, therefore, should be deprived of the right to preach as a priest of the Catholic Church, or to teach in any institution of learning, there could be no question that the clauses would constitute a bill of attainder within the meaning of the Fed-

[41] The same view in respect to all *ex post facto* laws had been taken by Chief Justice Marshall in *Fletcher* v. *Peck*, 6 Cranch 87 in which he had concluded (pp. 138-139):

> This rescinding act would have the effect of an *ex post facto* law. * * * This cannot be effected in the form of an *ex post facto* law, or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant?

eral Constitution. If these clauses, instead of mentioning his name, had declared that all priests and clergymen within the State of Missouri were guilty of these acts, or should be held guilty of them, and hence be subjected to the like deprivation, the clauses would be equally open to objection. And, further, if these clauses had declared that all such priests and clergymen should be so held guilty, and be thus deprived, provided they did not, by a day designated, do certain specified acts, they would be no less within the inhibition of the Federal Constitution.

In all these cases there would be the legislative enactment creating the deprivation without any of the ordinary forms and guards provided for the security of the citizen in the administration of justice by the established tribunals.

The results which would follow from clauses of the character mentioned do follow from the clauses actually adopted. The difference between the last case supposed and the case actually presented is one of form only, and not of substance. The existing clauses presume the guilt of the priests and clergymen, and adjudge the deprivation of their right to preach or teach unless the presumption be first removed by their expurgatory oath—in other words, they assume the guilt and adjudge the punishment conditionally. The clauses supposed differ only in that they declare the guilt instead of assuming it. The deprivation is effected with equal certainty in the one case as it would be in the other, but not with equal directness. The purpose of the lawmaker in the case supposed would be openly avowed; in the case existing it is only disguised. The legal result must be the same, for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding.

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> Now, as the State, had she attempted the course supposed, would have failed, it must follow that any other mode producing the same result must equally fail. The provision of the Federal Constitution, intended to secure the liberty of the citizen, cannot be evaded by the form in which the power of the State is exerted. If this were not so, if that which cannot be accomplished by means looking directly to the end, can be accomplished by indirect means, the inhibition may be evaded at pleasure. No kind of oppression can be named against which the framers of the Constitution intended to guard, which may not be effected.

It matters not, therefore, that the statute under attack is not in the *letter* of the English precedents. The *substance* of those precedents, no matter in what form it may be made manifest, is proscribed by the Constitution. This is the clear implication of the statement by Mr. Justice Holmes in *McFarland* v. *American Sugar Company*, 241 U. S. 79, 85. The same point has been summarily stated in Cooley, *Principles of Constitutional Law* (3d ed. 1898) pp. 311-312:

> It is conceded on all sides, that the purpose of the constitutional inhibition is to take away the power to pass either [bills of attainder or of pains and penalties]; in short, wholly to deprive the government of any power to inflict legislative punishment for criminal, or supposed criminal conduct. And a case in which the punishment is imposed indirectly * * * is as much a bill of attainder as is an act directly imposing a punishment.

See, also, *Burgess* v. *Salmon*, 97 U. S. 381, 385.

That Section 304 takes the *form* of a denial of appropriations, therefore, is of no significance, if its *substance* is that of a bill of attainder. In this respect, too, the power of appropriation lodged in Congress by the Constitution is subject to the positive prohibition contained in other parts of that document. See pp. 90-99, *supra*. Our concern is the nature of the constitutional prohibition, not the manner in

which it is attempted to be circumvented. The language of the Court in the *Cummings* case is directly applicable here (4 Wall. at p. 325):

> The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding.

The same point was made in *United States* v. *Klein*, 13 Wall. 128.

We turn, then, to the substantive elements of bills of attainder.

2. BILLS OF ATTAINDER ARE CHARACTERIZED BY THEIR APPLICATION TO NAMED OR EASILY ASCERTAINABLE INDIVIDUALS

It is not necessary, as the *Cummings* and *Garland* cases themselves illustrate, that the persons to be affected by a bill of attainder be named in the bill. Yet it was the outstanding characteristic of bills of attainder, as they were known at the time of the Constitution, that they did operate against a particular individual. Richard Wooddeson, who succeeded Blackstone as Vinerian Professor at Oxford, states of them during a course of lectures delivered in 1777 (*Law Lectures*, *supra*, No. 41, at p. 622) that "instead of being general, they are levelled against the particular delinquent." By the same token, they were of limited scope, and had no effect except to work the punishment on the individuals to be proscribed; as Wooddeson states it, "instead of being permanent, they expire, as to their chief and positive effects, with the occasion" (*id.* at p. 623).

In the *Cummings* and *Garland* cases, this factor was absent. See also *McFarland* v. *American Sugar Company*,

241 U. S. 79, 85, 86. The test oaths there involved operated equally on the whole community, and the argument of the dissenting judges was not without force, that under the circumstances the acts in question were not more than general legislation prescribing qualifications for office, or for the professions. See 4 Wall. at pp. 389-390. The majority of the Court, however, held that notwithstanding their apparent general application, the test oath statutes contained the characteristic intention to inflict punishment on certain ascertainable individuals for prior acts which would otherwise have been unpunishable. In the *Garland* case, for example, the Court said (4 Wall. at p. 379):

> The legislature may undoubtedly prescribe qualifications for the office, to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life. *The question, in this case, is* not as to the power of Congress to prescribe qualifications but *whether that power has been exercised as a means for the infliction of punishment,* against the prohibition of the Constitution. That this result cannot be effected indirectly by a state under the form of creating qualifications we have held in the case of *Cummings* v. *The State of Missouri,* and the reasoning by which that conclusion was reached applies equally to similar action on the part of Congress. (Italics supplied.)

That even in such a case the Court denounced the acts for what they were—legislative penalties for past offenses—only serves to emphasize the extent to which the Court will cut through to the substance of the challenged statute.[42]

In the present case, of course, the argument upon which the dissenting judges in the *Cummings* and *Garland* cases

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[42] Of course, statutes which operate generally to prescribe, for example, qualifications for office or for professional standing, may be applied to, or affect such pursuits retrospectively without violation of the Constitution. See, *e. g., Hawker* v. *New York*, 170 U. S. 189; *Dent* v. *West Virginia*, 129 U. S. 114; *Cases* v. *United States*, 131 F. (2d) 916 (C. C. A. 1st).

so strongly relied is not available. Section 304 names, *eo nomine*, the three respondents—"instead of being general, they are levelled against the particular delinquent." Section 304 did not provide any general qualification for office, or even for the offices which the particular respondents occupied at the time it was passed and became effective—"instead of being permanent, they expire, as to their chief and positive effects, with the occasion." It applies to no office or profession any qualification of any sort. It does not even suggest that if respondents changed their views, they would again be qualified for federal public office, or that if anyone else shared the views which respondents are alleged to have he, too, would become ineligible. Section 304 was simply and explicitly directed at respondents, and at respondents alone. In the language of the *Cummings* case (4 Wall. at p. 320), Section 304 "was required in order to reach the person, not the calling."

Actually, even the motive held adequate to condemn a *class* statute in the *Cummings* and *Garland* cases is present in respect to Section 304. We need not repeat the legislative background of Section 304 (pp. 7-20, *supra*) to demonstrate that, as in the test oath cases, that Section eventuated from a belief that if Congress did not act to punish these individuals, they would escape all punishment. Congress created a new offense—"subversive activity"—tried respondents, determined their guilt, and inflicted the punishment it deemed commensurate with the gravity of the offense. Again, as in the test oath cases, the offense bore no necessary relation to their work; the Chairman of the Kerr Committee admitted frankly that the Committee's trial had not dealt with respondents competence, or whether they were doing, or had done, a good, bad or indifferent job (*Cong. Rec.*, Vol. 89, p. 4583). The issue was whether they had committed the offense; the permanent ban on future federal employment was the penalty.

3. BILLS OF ATTAINDER ARE "LEGISLATIVE ACTS WHICH INFLICT PUNISHMENT * * *".

It is clear from the *Cummings* and *Garland* cases that the question of what constitutes "punishment" within the meaning of the definition of bills of attainder is not to be narrowly construed.

In the *Cummings* case, the constitutional provision there held invalid made the test oath a prerequisite for attorneys, clergymen, teachers, corporate officials and persons holding positions of honor, trust or profit for the State of Missouri. It was argued in support of the provision that it inflicted no punishment because " 'to punish one is to deprive him of life, liberty, or property, and that to take from him anything less than these is no punishment at all' " (4 Wall. at p. 320). The Court left no doubt as to the answer (*id.* pp. 320-321):

> The learned counsel does not use these terms—life, liberty, and property—as comprehending every right known to the law. He does not include under liberty freedom from outrage on the feelings as well as restraints on the person. He does not include under property those estates which one may acquire in professions, though they are often the source of the highest emoluments and honors. *The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the the causes of the deprivation determining this fact.* Disqualification from office may be punishment, as in cases of conviction upon impeachment. Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian, may also, and often has been, imposed as punishment. (Italics supplied.)
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> * * * * *
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> The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every

> one, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no other wise defined.

In the *Garland* case, the effect of the federal statute there in question was to exclude from the practice of law before the federal courts all attorneys who were unable to take an oath as to past loyalty. This, too, the court held, could "be regarded in no other light than as punishment for such conduct" (4 Wall. at p. 377).

Actually, no one can reasonably doubt that Section 304 inflicts punishment. Permanent disqualification from gainful federal employment is not merely punishment—it is *severe* punishment, as that term is ordinarily understood. Indeed, it is the extreme penalty for conviction upon impeachment permitted by the Constitution (Article I, Section 3, clause 7, *supra*, p. 46); removal from office is the necessary consequence of Senate conviction, but permanent disqualification for office is discretionary with the Senate. Story, *supra*, Sec. 803. It has on occasion been specified by Congress as the punishment for serious offenses.[43] Permanent disqualification from state employment was likewise one of

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[43] In 1790, permanent disqualification to hold "any office of honor, trust or profit under the United States" was a penalty for attempting to corrupt a federal judge. Act of April 10, 1790, Sec. 21, 1 Stat. 117. See, 18 U. S. C. Secs. 237, 238, 35 Stat. 1112. During the Civil War a similar penalty was imposed for insurrection and treason. Act of July 17, 1862, Sec. 3, 12 Stat. 589. It is now a penalty for such crimes as treason (18 U. S. C. Sec. 2, 35 Stat. 1088), interference with free elections by Army or Navy officers (*id.* Sec. 59), acceptance of a bribe, or the like, by a member of Congress (*id.* Secs. 199, 202, 203) or by any official of the United States (*id.* Sec. 207). It is not without significance that a person found guilty of advocacy of forceful overthrow of the Government, or of undermining the loyalty, discipline or morale of the armed forces, is made ineligible for federal employment, but only for five years following his conviction. *Id.* Secs. 9-13, 54 Stat. 670, 671.

the penalties meted out in the provision condemned in the *Cummings* case (see 4 Wall. at p. 317). And disqualification from office was the common, although usually not the total effect of a bill of attainder, or a bill of pains and penalties, at common (parliamentary) law.[44]

The dissenters in the *Cummings* and *Garland* cases argued, again, that in a general statute applicable alike to all persons, the prescribing of qualifications for office or the professions could not be regarded as "punishment" (4 Wall. at pp. 392-396). The majority, however, having concluded that the acts were *intended* to punish, found that the disabilities imposed were punishments within the meaning of the definition. Again, in the present case, there is no such argument available. Section 304 does not proceed against a class, but against these three respondents, and them alone.

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This punishment in an impeachment proceeding has been characterized by a House Judiciary Committee as "very severe in its penalties" (H. Rep. No. 141, 45th Cong., 3d Sess.). And certainly it has long been so regarded. See *In the Matter of Dorsey*, 7 Porter 293, 366, 368 (Ala.); *Barker* v. *People*, 3 Cow. 686 (N. Y.), *aff'ing* 20 Johns. 457.

[44] *E.g.*, the *bill of attainder* against Lord Clarendon which declared that he should "be forever disabled from having, holding, or enjoying any office or place of public trust" (see note 51 *infra*); and the *bill of pains and penalties* against Sir Francis Atterbury of like import (see note 36 *supra*).

All authorities agree that bills of attainder (or of pains and penalties), from the earliest recorded instances of their use in England late in the 13th Century onward to their last brief but drastic phase during and at the close of the long quarrel between the Commons and the Stuarts, were a means of punishment of "political" offenders—usually persons of position and influence whose political views were obnoxious to the dominant party. See Creasy, E. S., *Rise and Progress of the English Constitution* (3d ed. 1856) p. 252; Adams, Geo. B., *Constitutional History of England* (Schuyler rev. 1934) pp. 228-229, 280; Naismith, *English Public Law* (1873) p. 153; Stephens, *History of Criminal Law of England* (1883) Vol. I, pp. 160-161; Anson, *Law and Customs of*

Indeed, the characteristics of the punishment under bills of attainder are defined in the dissenting opinion in a manner which illustrates even more clearly the identity of Section 304 with the typical bills of attainder. Mr. Justice Miller, dissenting, states (4 Wall. at p. 388):

> The sentence pronounced and the punishment inflicted were determined by no previous law or fixed rule.

See also Wooddeson, *supra*, pp. 624, 638 *et seq.*[45] Certainly no prior law or rule provided the source of the penalty pre-

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*the Constitution* (5th ed. 1922) Vol. I, p. 362; Story, *Commentaries on the Constitution* (5th ed. 1891) Sec. 1344; Medley, *English Constitutional History* (6th ed. rev. 1925) p. 167.

"Subverting the government" was a common charge in the late modern period. Notorious among the English attainders by Act of Parliament was that of Thomas Wentworth, Earl of Strafford, most faithful counsellor of Charles I, in 1641 (see note 51 *infra*) on the ground that he had endeavored "to subvert the ancient fundamental Laws and Government." 17 Car. I. *DeLolme on the Constitution* (1838 ed.) Vol. I, p. 400; Hume, *History of England* (Brewer ed. 1880) pp. 183 *et seq.*; Medley, *supra*, p. 167; Feilden, Henry, *Constitutional History of England* (4th ed. rev. 1911) p. 153. Similarly in 1645 a preliminary impeachment against Archbishop Laud was converted into an attainder for attempting to alter the religion and fundamental laws of the realm. Howell, *State Trials*, Vol. IV, 598, 599. See Feilden, *ibid*; Medley, *ibid*. See also Hallam's discussion of the origin of the idea of constructive treason. *Constitutional History of England*. (Henry VIII through Geo. III) (5th ed. 1870) p. 576n. In 1715, the "Jacobite" Lords Bolingbroke and Ormond were impeached for acts prejudicial to the national welfare, *i. e.*, their share in the peace of Utrecht, and later attainted on failing to surrender. 1 Geo. I, cc. 16, 17. Howell, *State Trials*, Vol. XV, 1002, 1012. See, Feilden, *supra*, p. 156; also, note 36 *supra*.

[45] Wooddeson states (p. 638) that so far as the punishment is concerned, bills of attainder are characterized by "making therein some innovation, or creating some forfeiture or disability, not incurred in the ordinary course of law, and which are called *bills of pains and penalties*." Statutes of this kind were passed in practically every state during the Revolutionary period. See note 52 *infra*.

scribed by Section 304. No law or rule prescribed permanent disqualification from office as a penalty: no court could give that judgment—except, of course, the Senate after a verdict of guilty in an impeachment proceeding. But even the Senate, presumably, could not have imposed the unique punishment finally evolved in Section 304—a conditional ban, contingent on future presidential and Senate action. *That* punishment, the punishment to which respondents were subjected, is unique, evolved by the political necessity of obtaining Senate concurrence.

We should add, though it is obvious, that the conditional nature of the punishment imposed does not render it any the less punishment in the constitutional sense. As the Supreme Court stated in the *Cummings* case (4 Wall. at p. 324): "These bills [of attainder] may inflict punishment absolutely, or may inflict it conditionally." See Wooddeson, *supra*, p. 626[46] Moreover, in Section 304, the condition was one over which respondents had no control whatever. That respondents might not have been banned does not materially change the essential character, or the severity, of the proscription of Section 304.

4. Bills of attainder are legislative punishments "* * * without judicial trial."

No one will seriously contend that respondents, before the verdict of guilty was reached by the Kerr Committee, or by Congress, had a "judicial trial." Congress, under the Constitution, may not exercise "judicial" powers; the separation of powers implicit in our constitutional framework

[46] In *Gaines* v. *Buford*, 1 Dana 481 (Ky.) the Court stated (p. 510): "A British Act of Parliament might declare, that if certain individuals, or a class of individuals, failed to do a given act by a named day, they should be deemed to be, and treated as convicted felons or traitors. Such an act comes precisely within the definition of a bill of attainder * * *." The Virginia bill of attainder referred to in note 37 *supra*, was conditional in form.

necessarily restricts that power to the judiciary. *Cf. Merrill* v. *Sherburne*, 1 N. H. 199; *G. & D. Taylor & Co.* v. *Place*, 4 R. I. 324; *Pope* v. *United States*, 323 U. S. 1. See also pp. 44-46, *supra*. Even when exercising its carefully limited power to sit as a court of impeachment, the Senate does not accord the accused a "judicial" trial. It is still a "legislative" trial, proceeding according to the parliamentary law of impeachments, even though every effort may be made to conform to judicial action at its highest and best. Story, *supra*, Secs. 688, 766, 797; Kent, *Commentaries on American Law* (12th ed. 1884) p. *343n.(b); *The Federalist*, No. 65 (1802 ed.) Vol. II, p. 123; Coke, *supra*, pp. 14, 37; Wooddeson, *Law Lectures*, No. 40, pp. 611, 620.[47]

Yet this Court has not left the phrase "without a judicial trial" an undefined negative; the inevitable character of those other proceedings which do *not* constitute a judicial trial were tersely described in the *Cummings* case (4 Wall. at p. 323):

> * * * the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the textbooks, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether comformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense.[48]

That Section 304 lacked any elements of a judicial trial is, as we have stated, scarcely open to question; indeed, the

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[47] Jefferson's *Manual of Parliamentary Practice*, composed originally for use in the Senate of the United States, contains a section on impeachments (1858 ed., pp. 112-117), based on such English sources as Wooddeson's *Law Lectures*, Seldon's *Judicature in Parliament*, Grey's *Debates*, Hale's *Jurisdiction of Parliament*.

[48] The dissent in the *Cummings* and *Garland* cases agreed as to this characteristic of a bill of attainder: "They were convictions and sentences pronounced by the legislative department of the government, instead of the judicial" (4 Wall. at p. 388).

description of the *Cummings* case just quoted might aptly be applied to the proceedings of the Kerr Committee. We set out in detail below, pp. 138-150, the respects in which Section 304 denied to the plaintiffs the safeguards accorded them by judicial due process; and it is obvious that many of them were lacking. But perhaps an equally significant feature, closely related to that which we are now discussing, is the assumption by the Kerr Committee of the power to determine for itself the rules of evidence which should govern. This was a well known characteristic of bills of attainder in English history; when ordinary rules of evidence would not permit a conviction, a bill of attainder was a convenient way in which to avoid them entirely. See Wooddeson, *Law Lectures*, pp. 633 *et seq.*; Miller, *Lectures on the Constitution of the United States* (1893) p. 584; Medley, *English Constitutional History* (6th ed. rev. 1925), p. 166. Again, the dissenting judges in the test oath cases agreed: a characteristic of bills of attainder, they stated, was that "no recognized rules of evidence governed the inquiry." 4 Wall. at p. 388. See also Story, *supra*, Sec. 1344.

Perhaps it may be elaboration of the obvious, but a brief examination of the difference between bills of attainder and impeachments in English practice, will highlight the meaning of the phrase which describes the mode of proceeding expressly rejected by the Framers, in contrast with that which was expressly adopted. Certainly it will show even more clearly the characteristic of Section 304 as a bill of attainder. Both methods, of course, were available to Parliament when it wished to terminate the political, or social, position of an official or other person unpopular with its members.[49] When the acts committed were within the

[49] Wooddeson, *Law Lectures*, Nos. 40 and 41; May, Sir Thomas, *Law and Usage of Parliament* (12th ed. 1917) pp. 56, 594; Hale, *Jurisdiction of the House of Lords* (1796 ed.) Ch. 16; Holdsworth, *History of English Law* (3d ed. 1922) Vol. I, pp. 381-382, Vol. II, p. 451, Vol. VI, p. 260; Keir, D. L., *Constitutional History of Mod-*

established law of high crimes and misdemeanors (the generic name for impeachable offenses),[50] when the evidence at hand was adequate to convict after a hearing, when the punishment was considered sufficiently drastic, and when the Commons were not in a hurry, impeachment was used. Adams, *supra;* pp. 228, 280. When, on the other hand, Parliament wished to punish individuals under circumstances which might require innovations in the nature of the offense, the quantum or nature of evidence, or the severity of the punishment, it did so by a bill of attainder or of pains and penalties. Wooddeson, *supra,* pp. 596, 621, 624, 638-640; Blackstone, *supra,* Bk. IV, p. *259; Anson, *supra,* Vol. I, pp. 384, 388; West, Richard, *Discourse Concerning Treasons and Bills of Attainder* (1716) pp. 23, 93.[51]

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*ern England* (1485-1939) (1943) p. 160; Stephens, *Commentaries on the Laws of England* (13th ed. 1899) Vol. IV, pp. 258 *et seq.*

Impeachment, as a separate device, seems to have evolved near the close of the 14th Century. In 1399, at the suggestion of the Commons, it was declared that the Commons had no share in the judicial functions of Parliament, but were only petitioners. Creasy, *op. cit. supra* note 44, p. 252; *Ridge's Constitutional Law of England* (Keith, 7th ed. 1939) p. 244n.

[50] Foster, *Commentaries on the Constitution of the United States* (1896) p. 586. See, also, Lawrence, William, *A Brief of the Authorities upon the Law of Impeachable Crimes and Misdemeanors* (Government Printing Office, 1868) pp. 5 *et seq.* (brief prepared as part of the opening argument for the Managers of the House on the Impeachment of President Johnson); and Simpson, Alex, *A Treatise on Federal Impeachments* (1916) pp. 30-49.

[51] The bill of attainder against Sir John Fenwick in 1696 (8 & 9 Wm. III. c. 4), for which there was a deficiency of legal proof, and that against Lord Clarendon in 1667 (19 Car. II. c. 10), in which the penalty imposed was greater than that under established law, are illustrative. Howell, *State Trials,* Vol. XIII, 712, 755; Vol. VI, 391; Wooddeson, *op. cit.,* pp. 638-640. It was common practice during the reigns of the Tudors to pass bills of attainder or pains and penalties without the victims being heard in their defense or examination of witnesses. *E. g.,* Countess of Salisbury, Earl of Essex, and others (Howell, *State Trials,* Vol. I, 434;

The contrast between Section 304 and impeachments, and the parallel between that Section and bills of attainder, need no further elaboration. The Kerr Committee was certainly creating a new offense: "subversive activity", its Report admits, "has not been defined by the courts or by Congress, and your committee must necessarily undertake a definition" (H. Rep. No. 448, *supra*, p. 5). Its definition, in fact, could bring almost anyone within the ambit of the offense. The Kerr Committee, and Congress, certainly did not purport to follow accepted rules of evidence, or of procedure—either parliamentary or judicial; the hearings were secret, and even the nature of the evidence upon which the Committee acted, and the identity of the opposing witnesses, were undisclosed, to cite but a few examples. The punishment meted out was one created for the occasion, as we have already pointed out, *supra*, p. 128. The House of Representatives purported to exercise, with the Senate, "judicial magistracy". In short, by the proceedings of the Kerr Committee and by Section 304 full advantage was taken of the great convenience which, in former days, had attended the device of bills of attainder—the conviction and punishment of individuals without the necessity of the formality or safeguards of judicial trials.

It was, indeed, precisely those characteristics which caused the universal condemnation of the device. Story, for example, in describing this aspect of legislative judicature, stated (*Commentaries*, Sec. 1344):

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De Lolme, *op. cit. supra* note 44, Vol. I, pp. 164-167); also, Sir Thomas More and Bishop Fisher (26 Hen. VIII, cc. 1, 2, 13; Howell, *State Trials*, Vol. I, 385, 395). See Reeves, *History of the English Law* (3d ed. 1814) Vol. IV, pp. 406 *et seq.* Indeed, the Commons have used bills of attainder after an impeachment had been attempted, and had failed because the crime charged was not within established parliamentary law of high crimes and misdemeanors. The proceedings against the Earl of Strafford furnish the outstanding example. Howell, *State Trials*, Vol. III, 1235, 514, 518. See, Wooddeson, *op. cit.*, pp. 629-633. See also note 44, *supra*.

> In such cases, the legislature assumes judicial magistracy, pronouncing upon the guilt of the party without any of the common forms and guards of trial, and satisfying itself with proofs, when such proofs are within its reach, whether they are conformable to the rules of evidence or not. In short, in all such cases, the legislature exercises the highest power of sovereignty, and, what may be properly deemed an irresponsible despotic discretion, being governed solely by what it deems political necessity or expediency and too often under the influence of unreasonable fears, or unfounded suspicions. * * * The punishment has often been inflicted without calling upon the party accused to answer, or without even the formality of proof; and sometimes, because the law, in its ordinary course of proceedings, would acquit the offender.

And, even in England, where no higher bar exists against such acts than that imposed by Parliament itself, their dominant features have caused them to fall into total disuse. The condemnation of Wooddeson, delivered in 1777, is characteristic (*supra*, pp. 641-645):

> Bills of attainder for treason, notwithstanding their plausible pretences, have offended the general humanity of this nation, and have been remarked to roll, like Sisyphus's stone, on the promoters. The natural justice of such bills has been inferred from many arguments, the principal of which I shall allude to, and shall cursorily consider their weight, without affecting to determine so important and serious a question. These advocates * * * conclude, that whoever is convinced in his conscience, whether by evidence legally admissible or otherwise, that the accused person is guilty, ought to give his consent to a bill of attainder and that, upon the whole, when it is the act of the Supreme power, whoever deserves to die dies justly.
>
> On these reasons I shall first premise an observation before intimated, that it is very difficult to ascertain the just foundation, measure, and limit of punishment in a supposed state of nature, and that little progress has been made in this inquiry by the great masters of general jurisprudence.—But whatever just power, of not only repelling, but of preventing or punishing,

wrong by extemporaneous methods, individuals might possess in such ideal state, this can hardly extend to authorise the infliction of occasional punishments by the rulers of society.—All civil magistracies have in reason their appointed province. The legislative ought not to intrench on the judicial. Legislation, as it is the noblest exertion of human sovereignty, is the hardest task of human wisdom; and should not be perplexed by such temporary considerations or conjunctures as might hazard impartiality of decision. Hence the political congruity of first enacting laws, and then inforcing them on subsequent occasions, and by different magistrates, has been confirmed by the very constant usage of the world; in the observance of which, the subjects of every state have been thought deeply interested. Thus when a *general* law is made restraining crimes, the due application of it is a new field to exercise the faculties of our minds. To do the whole at once is relying too much on our judgments, especially when the various passions are heated or alarmed by an interesting crisis. Such is not the time practically to overturn legal institutions, which have either been sanctioned by long tradition and experience, or were dictated by temperate reflexion and having universality for their object, were uninfluenced by present fears, and personal enmity or favor.

The defence of bills of attainder relies much on the supposition of what is rarely true, and still more rarely can be proved, as it ought, tho true, that the safety of the state essentially depends on the death of the particular offender. What traitor, when discovered, can be so formidable? what people so insecure? • • • •

We submit, therefore, that Section 304 is a bill of attainder within the meaning of the constitutional prohibition. Every feature is present which was held requisite in the *Cummings* and *Garland* cases—indeed almost every element which was thought requisite by the dissenting judges in those cases.[52]

[52] The only element mentioned by the dissent which is here absent is the corruption of blood (4 Wall. at p. 387). There is no warrant in English or American precedents, however, for considering this

### C. THE HISTORY OF SIMILAR RIDERS IN CONGRESS CONDEMNS SECTION 304 AS A BILL OF ATTAINDER.

We recognize that to assert that an act of Congress is void as a bill of attainder may appear to be an attempt to resurrect a dead epoch in history. Happily, few statutes enacted since the adoption of the Constitution have been subject to this vice. In one aspect, however, it becomes even more important that there be, now, no recurrence of such practices, and that the members of Congress who opposed Section 304, and similar bills, on this among other grounds, be sustained by the solemn judgment of the courts. For there have been recent instances, as we have already noted, in which bills such as this have been proposed; and until Section 304 was enacted, the objection that they were

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a *sine qua non* of those "bills of attainder" known as bills of pains and penalties. A judgment of death was necessary to attaint and the consequences of attainder were forfeiture and corruption of blood. Blackstone, *Commentaries* (3d ed. 1884) Bk. IV, pp. *380 *et seq.*; Coke, *First Institute* (on Littleton) (Thomas ed. 1818) Vol. III, pp. 559, 563, 565. But if the judgment was less than death, there was no attaint, and only lesser punishment, denominated pains and penalties, was inflicted. Such punishments, Blackstone recognized, could vary widely, affecting persons or property (Blackstone, *supra*, p. *377):

> Some punishments consist in exile or banishment, by abjuration of the realm, or transportation: others in loss of liberty, by perpetual or temporary imprisonment. Some extend to confiscation, by forfeiture of lands, or movables, or both, or of the profits of lands for life: others induce a disability, of holding offices or employments, being heirs, executors, and the like. Some, though rarely, occasion a mutilation or dismembering. * * *. Some are merely pecuniary, by stated or discretionary fines: and lastly, there are others that consist principally in their ignominy, though most of them are mixed with some degree of corporal pain: * * *

This generic identity yet recognized difference between bills of attainder and bills of pains and penalties is implicit in the statement of Chief Justice Marshall in *Fletcher* v. *Peck*, 6 Cranch 87, 138:

bills of attainder has always been among the arguments which prevailed to ensure their defeat.

We have already noted, at pp. 104-109, *supra*, the instances in which attempts were made to secure the enactment of bills similar to but far less sweeping than Section 304. Without repeating the circumstances of each case, it will suffice here to notice the arguments made in Congress in opposition to these proposed statutes because they were bills of attainder. In the first such attempt, that involving Major

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"A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both." An example of an English bill of pains and penalties is one enacted in 1661 (13 Car. II. c. 15) against a group of persons who had been excepted from Charles II's "Act of Free, and general Pardon, etc." It recited their punishment to be:

> * * * all of them excepted out of the said Act, and reserv'd for future Pains, Penalties and Forfeitures, not extending to Life: * * * It is therefore Enacted, That all and every the Manors, Lands, etc. * * * shall be forfeited to his Majesty * * * And * * * shall be and are hereby degraded from and made uncapable of all and every the Titles of Honour, Dignities, and Preheminences, which they or any of them now have, or which at any time hereafter may descend unto them: * * * but shall be forever reputed, and are hereby declared to be Persons of Dishonour and Infamy.

*Reasonableness of Parliamentary Proceedings by Attainder, etc., op. cit.*, p. 35. See also bill of pains and penalties directed at Sir Francis Atterbury in 1722, *supra* notes 36 and 44.

Practically all of the American precedents are bills of pains and penalties, inflicting such punishments as forfeiture, banishment, disfranchisement, disqualification from holding office (Delaware, Act of June 26, 1778), close imprisonment, and the like. In New York an Act of Disfranchisement (1779) was passed by which "voluntarily remaining in a country overrun by the enemy", an act perfectly innocent when done, was made penal. Only in New York does it appear that capital punishment was inflicted on Loyalists by an act of legislative judicature. See Thompson, *Anti-Loyalist Legislation During the American Revolution* (1908) 3 Ill. L. Rev. 81, 153 *et passim*, and John C. Hamilton, *op. cit. supra* note 38, Vol. III, pp. 23-40.

Cresson in 1924, Mr. Tucker, of Virginia, stated (*Cong. Rec.*, Vol. 65, p. 5033):

> Mr. Chairman and gentlemen, I know nothing in the world about this case or about this officer. I do not know his name, but this is certainly one of the most remarkable propositions, I think, that ever was presented to this House. The legislative power of this Congress, Mr. Chairman, is practically unlimited, and yet there is a limitation upon it, for the Constitution declares that no bill of attainder shall be passed.
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> * * * * *
>
> The Constitution declares specifically that no bill of attainder can be passed. What is a bill of attainder? It is a legislative act prescribing punishment without judicial trial. This man may be as guilty as Judas Iscariot, but he is entitled to a trial. Why, gentlemen, the hornbooks teach this doctrine so plainly and simply that I really was anxious to have this matter discussed on the other side before I appeared.
>
> This is no new proposition. The two old cases of Ex parte Garland and Cummings against Missouri, both in fourth Wallace, United States Report, followed by innumerable cases, hold that you can not by a legislative act punish a man without a judicial trial.
>
> Gentlemen sometimes wonder why we have a Constitution, and laugh at it. Thank God, we have written that principle in the Constitution of my country.
>
> * * * * * *
>
> Mr. Chairman, I did not rise to go into this discussion, but merely to call attention to a primary, fundamental principle that every boy down in Virginia knows, and if such a provision were to go through this House as this is, it would be worthy of the Fiji Islands and not of free America.

See also Mr. Newton of Minnesota (*id.* p. 5042).[53]

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[53] See also the remarks in connection with the bill (H. R. 9766, 76th Cong.) to deport Harry Bridges; *e. g.*, Mr. Hobbs of Alabama (*Cong. Rec.*, Vol. 86, p. 8201); Mr. Havenner of California (*id.* p. 8184); Mr. Leavy of California (*id.* p. 8200); Mr. Coffee of Washington (*id.* pp. 8208-8213). See also the opposition to the

A like objection was urged against the Lasser rider contained in the Emergency Appropriation Act of 1942 (*supra*, pp. 106-109). See, *e.g.*, Mr. Flannagan of Virginia (*Cong. Rec.*, Vol. 87, p. A2984). And Senator Barkley made the same point in his strongly worded denunciation of the Watson rider in May 1942. *Cong Rec.*, Vol. 88, pp. 3997-3998. See also Senator Murdock (*id.* p. 4000). And see the same arguments on Section 304 itself. *E.g.*, Mr. Coffee of Washington (*Cong. Rec.*, Vol. 89, p. 4548); Mr. Ford of California (*id.* p. 4549); Mr. Hobbs of Alabama (*id.* pp. 4597, 5513-5514).

We submit, therefore, that Section 304 must be stricken down as a bill of attainder prohibited by Article I, Section 9, clause 3 of the Constitution. On this ground, too, plaintiffs are entitled to recover.

## IV

### Section 304 is Unconstitutional Because It Denies Respondents Due Process of Law.

The third fundamental objection to Section 304 is that it denies to the respondents the safeguards and rights guaranteed to them by the due process clause of the Fifth Amendment. Justice Madden, in the court below (R. 46-47), so held.

The objection to Section 304 on this ground is on both the substantive and the procedural level. Substantively, the rider is to be condemned for its obvious discrimination in singling out respondents by name for permanent

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bill expressed by Attorney General Jackson (*Cong. Rec.*, Vol. 86, p. A4155), and by then Solicitor General Biddle (*id.* p. A4184), and the resolution of the American Bar Association condemning it (A. B. A. Rep., Vol. 65, p. 227). The bill passed the House, was reported to the Senate (S. Rep. No. 2031), but was not passed. A similar bill was introduced into the 77th Congress (H. R. 1644) and again passed the House (*Cong. Rec.*, Vol. 87, p. 7675), but was never reported to the Senate.

disqualification for federal employment. Procedurally, the absence of the fundamental safeguards which attended the Kerr Committee, and the entire Congressional proceeding—an absence which is perhaps the inevitable concomitant of any legislative attempt to determine guilt and assess punishment—also condemn the statute.

*A. THE DISCRIMINATION APPARENT ON THE FACE OF SECTION 304 RENDERS IT VOID UNDER THE FIFTH AMENDMENT.*

Wholly apart from the objections urged in Points II and III, we believe that Section 304 is, on its face, a palpable violation of the due process clause. A statute aimed solely at three persons, specifying them by name, certainly is immediately suspect, and there is nothing present here which justifies any conclusion than that of arbitrary discrimination.

Due process of law, as it is used in the Fifth Amendment, is one of the basic safeguards of the citizen. One of the things which it has always guaranteed is that no particular person should be arbitrarily singled out for legislative action. As the Court said of both the Fourteenth and the Fifth Amendments in *Hurtado* v. *California*, 110 U. S. 516, 535:

> But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. *It must be not a special rule for a particular person or a particular case.*" (Italics supplied.)

Thus even though the Fifth Amendment does not contain, like the Fourteenth Amendment, a clause guaranteeing equal protection of the laws, the courts have recognized not only in the *Hurtado* case, but on many occasions, that discriminatory action which is highly arbitrary and injurious would violate the Fifth Amendment. *Hirabayashi* v.

*United States*, 320 U. S. 81, 100; *Nichols* v. *Coolidge*, 274 U. S. 531; *Wallace* v. *Currin*, 95 F. (2d) 856, 867 (C. C. A. 4th), *aff'd* 306 U. S. 1; *Minski* v. *United States*, 131 F. (2d) 614, 617 (C. C. A. 6th); *United States* v. *Ballard*, 12 F. Supp. 321, 325-326 (W. D. Ky.).

Undoubtedly, in a *general* law, there is a strong presumption that the legislative classifications are based upon sound reasons—reasons which the courts will not ordinarily question. The power of the legislature to classify individuals into groups is unquestioned, and such classifications may be based on any rational ground—except, of course, those that violate other constitutional limitations. Here, however, the presumption runs the other way. Section 304 sets up no class of persons; it enacts no general law applicable to all who fall within its ambit; it lays down no standards or rules. Section 304 is *individual* legislation, pure and simple. There is no other member of the community, no one except the three respondents who are identified by name in the statute, who is affected by its terms.[54]

Such a law, we submit, is so contrary to our traditions as to be justly subject to the condemnation of the Fifth Amendment. As the court stated in *United States* v. *Ballard*, *supra*:

> Nothing is more repugnant to the American mind than that * * * among fellow citizens there should be one law for one individual and a different law for another * * *. "Due process of law" has been defined many times as meaning the law of the land, and the law of the land implies a general public law, equally binding on every member of the community * * *. Purely arbi-

[54] That Congress might have wished that all persons found guilty of "subversive activity" be similarly proscribed from Government service cannot obscure the fact that it passed no such general law, equally applicable to all, but chose rather to single out individuals by name. A bill which would undertake to remove from office persons found guilty by the courts of "subversive activity" has been introduced in the present Congress (H. R. 1433, 79th Cong., 1st Sess.), but no action has been had on it.

> trary orders directed against individuals or classes are not the law of the land.[55]

Mr. Justice Holmes made the same point in *McFarland v. American Sugar Company*, 241 U. S. 79, in which the challenged statute was not explicitly, but only tacitly, applicable to a particular person. He said (241 U. S. at 86):

> The presumption created here has no relation in experience to general facts. It has no foundation except with tacit reference to the plaintiff. But it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.

But, it was argued on behalf of Congress in the court below, there can be no violation of due process in an appropriation act. Congress, it was said, may appropriate for legal reasons, moral reasons, or no reasons at all, and how much more unlimited must be its power *not* to appropriate, as in Section 304. We have already dealt with a similar argument (pp. 90-99, *supra*) but a word more may be in order. At first blush, one would admit that Congress could refuse to appropriate for reasons or no reasons; because of legal doubts or because of sheer inertia; because the proposed object of its appropriation was already supplied with funds, or because it contained a high proportion of people with red hair. All that is true, of course.

But Section 304 is not a simple refusal to appropriate. As pointed out above (pp. 30-39), the plain purpose and necessary effect of the rider were to remove respondents from office on November 15, 1943, or at least to deprive

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[55] It is significant that under state constitutional provisions guaranteeing due process of law (but, like the Fifth Amendment, without a specific "equal protection of the law" clause) the state courts have also stricken down discriminatory and special legislation. *E. g.*, *Metropolitan Trust Co.* v. *Jones*, 38[illegible] Ill. 248; 51 N. E. (2d) 256; *Sheldon* v. *Hoyne*, 261 Ill. 222, 103 N. E. 1021; *Charles J. Off & Co.* v. *Morehead*, 235 Ill. 40, 85 N. E. 264; *State* ex rel. *Hamby* v. *Cummings*, 166 Tenn. 460, 63 S. W. (2d) 5[illegible]. *Cf. State* ex rel. *Tolerton* v. *Gordon*, 236 Mo. 142, 407, 139 S. W. 403.

them of all substantive right to compensation after that date. In singling out respondents for such punishment, the rider plainly deprives them of property without due process of law. Furthermore, this provision is, in effect, a *permanent* disqualification from public office—a forfeiture of position and reputation as a citizen. Though phrased in terms of limitation on the use of appropriations, it constitutes the imposition of a penalty equal to that which the Senate may impose for conviction upon impeachment, a punishment which will for all time set these three respondents apart from every other citizen in the United States. Respondents are in effect debarred for life from Federal public office. To describe that as a simple failure to appropriate is to close one's eyes to realities.

The matter can be stated in another way. A failure to appropriate is the act of a particular Congress, or a particular session of Congress. An appropriation bill may not pass, or it may pass with a limitation placed in it as to the uses of that particular appropriation. Section 304, however, is *permanent*. So long as it remains unrepealed, Section 304 would, if effective, be a constant limitation on *every* appropriation act of *every* Congress. Can that result, by any reasonable person, be characterized as a simple refusal to appropriate? Certainly not.

We submit, therefore, that on its face Section 304 does not meet the test of due process, as we know it. Senator Barkley summed it up in his statement to the Senate in opposition to this rider (*Cong. Rec.*, Vol. 89, p. 6693):

> I feel that such action by any legislative body outrages all the principles of fair play and democracy, as we think we are now fighting to preserve it in the world.

### *B. THE PROCEDURE BY WHICH RESPONDENTS WERE CONVICTED ALSO VIOLATES THE FIFTH AMENDMENT*

The discrimination apparent in Section 304 is made even more apparent by a brief consideraton of the procedure by which respondents were convicted and punished.

Confessedly, legislative methods cannot be judicial methods. Congressional committees could not function at all if they were bound by the safeguards which are indispensable attributes of courts. Even in impeachment proceedings, where there are many safeguards, this must be true. See pp. 111, 130-131, *supra*.

Yet, when Congress assumes, as in this case, the function of a court, and passes judgment of guilt or innocence on *individuals*, there must, we submit, be *some* standards by which the propriety of its action may be judged; some limits beyond which it may not go consistent with constitutional guarantees. All other considerations aside, the individual who is being judged must have *some* rights of which even legislative judgments cannot deprive him.

We go further. We earnestly believe that Congress cannot, consistent with the due process clause of the Constitution, exercise what, for lack of a better term, we may call the functions of judicature. Legislative *judgment* on matters of policy calls for the utmost in ability, energy and wisdom. Legislative bodies are so organized, and so function, that their combined wisdom, ability and energy may be most effectively marshalled for the task of *creating* legislation—for lawmaking is essentially a *creative* function. But when Congress abandons that function, and essays, in its lawmaking role, to act as a judicial agency, it stands revealed as utterly lacking the facilities necessary to accord to the individual who stands accused the protections which are the hall-mark of our system of law. Whether the act be in terms a bill of attainder or not, legislative "justice", in this sense, exhibits *ex necessitate* all of the features of bills of attainder which by 1789 had made them odious on both sides of the Atlantic.

Dean Pound has stated the case (*Justice According to Law*, 14 Col. L. Rev. 1, 7-11):

> • • • Examining the actual operation of legislative justice in the several cases named, it may be said without hesitation that in action it exhibits all the bad features of justice without law.

In the first place, legislative justice is unequal, uncertain, and capricious. Bills of attainder, even in modern times, were too often merely legislative lynchings, and bills of pains and penalties, of which there were many examples during and immediately after the Revolution, were enacted capriciously, were procured on grounds of ill will in relatively trivial cases as well as in the grave cases involving danger to the commonwealth for which they were supposed to be reserved, and became deservedly odious. * * *

Again, legislative justice in its relatively short history in this country and in the relatively small number of cases in which it was exercised showed the influence of personal solicitation, lobbying and even corruption far beyond anything which even the most bitter opponent of our judicial system has charged against the courts in the course of a long history and after disposition of a huge volume of litigation.

Thirdly, legislative justice has always proved highly susceptible to the influence of passion and prejudice. * * * This feature of legislative justice was one of the chief causes of the odium which attached to acts of attainder and bills of pains and penalties at the end of the eighteenth century * * *

Closely related to the foregoing characteristic of legislative justice is a fourth, namely, the preponderance of purely partisan or political motives as ground of decision. * * *

Finally legislative justice has been disfigured very generally by the practice of participation in argument and decision by many who had not heard all the evidence and participation in the decision by many who had not heard all the arguments. * * *

* * *In sum, legislative justice is uncertain, crude at its best and capricious at its worst, cumbersome and expensive, with no corresponding advantages. Hence from the Twelve Tables to modern constitutions men have agreed in prohibiting it. The provisions of modern constitutions in this respect represent more than the influence of eighteenth-century theory. They represent a universal experience of the ills involved in legislative justice.

We do not mean to state, or to imply, that the Kerr Committee was actuated by improper motives, or that it did not accord respondents in terms of customary *legislative*, lawmaking procedures, those privileges which it deemed consonant with getting a result. Many of the characteristics of the Kerr Committee hearings which we notice below, such as its executive sessions, the evidence not of record, the summary and partial report to the Congress, may well be proper conduct of *legislative* business. What we do say, however, is that when Congress undertook to act as judge and jury in the cases of these individuals, those same procedures become so unfair and so arbitrary as to require the conclusion that they are not due process of law.

The first instance of such procedural unfairness is in the notice of the hearing afforded respondents. Respondent Lovett was "invited" to appear before a meeting of the Committee on April 15, 1943, by a letter handed to him on April 14, 1943 (R. 21)—some 24 hours of notice for preparation to meet a charge so grave as to be almost tantamount to treason. Respondent Watson was similarly "invited" by letter dated April 7, 1943, presumably delivered to him on April 8, to appear in person before the Committee on April 9 (R. 26). We do not have the dates in the case of respondent Dodd but the timing was presumably similar.[56] In a court of law, such procedures would not sustain a minor fine. *Cf. Roller v. Holly*, 176 U. S. 398, 408-410.

The timing of the notice to appear before the Committee made little more than a hollow gesture the advice in the notice to respondents Lovett and Watson that if they were unacquainted with "the charges and allegations concerning [them] a copy would be furnished upon request" (R. 21, 26. See Rule 4 of the Committee). Neither of these

[56] Although respondents were not subpoenaed, the "invitation" was stated in mandatory language—"you are instructed to appear at Room 449 * * *" (R. 26). See Rule 4 of the Committee.

respondents attempted to secure copies of the charges (R. 21, 27), since obviously, in the few hours available to them, they would have been useless.[57] In the case of respondent Dodd, however, the Committee did not even follow its own rules. He was *not* advised that copies of the charges against him would be furnished on request (*Cf.* R. 31 and R. 27), as required by Committee Rule 4. And more than that, when he nevertheless attempted to secure some information from the Committee along this line, he was informed by the Committee that it had formulated no charges of any sort against him (R. 30).[58]

The nature of the hearings themselves is further illustration of the unfairness of the procedure. The Rules of Procedure adopted by the Committee on March 23, 1943 (R. 20)—well *before* the hearings began—were unknown to the respondents when they appeared, since they were first made public on June 2, 1943, after the hearing had been concluded (*ibid.*). All of the proceedings were in "executive"—*i.e.*, secret—sessions (R. 21, 26, 30. See Committee Rule No. 1).[59] Each of the respondents appeared alone before the Committee, it having been decided by the Committee that respondents would be heard "without any persons other than the Subcommittee, its staff, and the witness being present" (R. 21, 27, 30-31). Both the General Counsel of the Federal Communications Commission and the Solicitor of the Department of the Interior, who wished to

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[57] The same comment is applicable to the fact that each respondent "was given *at the hearing* full opportunity to make any statements or explanations he desired" (R. 21, 27, 31).

[58] *Cf.* Constitution, Amendment VI, requiring that an accused shall "be informed of the nature and cause of the accusation;" *Morgan* v. *United States*, 304 U. S. 1, 18, 19, 25; *Lipke* v. *Lederer*, 259 U. S. 557, 562; *United States* v. *Cohen Grocery Co.*, 255 U. S. 81; *United States* v. *Cruikshank*, 92 U. S. 542, 558.

[59] *Cf.* Amendment VI, requiring a "public trial"; *Gaines* v. *Washington*, 277 U. S. 81; *Snyder* v. *Massachusetts*, 291 U. S. 97, 106; *Davis* v. *United States*, 247 Fed. 394 (C. C. A. 8th).

be present only as observers, were denied permission to accompany the respondents (R. 21, 27, 30-31).[60]

Respondents were not, even at this hearing, apprised of the evidence against them, or of the nature or identity of their accusers.[61] Rule 3 of the Committee's Rules indicates that the Committee itself would—

> proceed to collect and review all of the reports of the several committees and the reports of investigations made by the Federal Bureau of Investigation together with such transcripts of evidence as may be available from the several investigating committees, and prepare a digest or memorandum of each individual case for the aid of the committee and for use at such time as the person charged shall appear for Examination.

None of this material was exhibited to the respondents when they appeared, except that the "charges" made by the Committee on Un-American Activities were shown to respondents Lovett and Watson, but not Dodd (R. 21, 27, 30). As the findings state (*e.g.*, R. 21), except for these charges, and the respondents' testimony—

> The evidence and other materials gathered during the course of prior investigations by the Federal Bureau of Investigation, by the Committee on Un-American Activities, and by others, which were considered by the Sub-Committee in connection with plaintiffs' case, were and are confidential. * * *

Indeed, this evidence is unknown, even now, not only to respondents but also to the Congress which voted Section 304. Respondents were found guilty, in other words, upon evidence known only to some of their judges—evidence which they obviously could neither question nor rebut. *Cf.*

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[60] *Cf.*, Amendment VI, providing that the accused shall "have the Assistance of Counsel for his defense"; *Glasser* v. *United States*, 315 U. S. 60; *Johnson* v. *Zerbst*, 304 U. S. 458.

[61] *Cf. Motes* v. *United States*, 178 U. S. 458, 467 *et seq.*; *Kirby* v. *United States*, 174 U. S. 47, 55 *et seq.*

*Interstate Commerce Commission* v. *Louisville & Nashville R.R.*, 227 U. S. 88, 93-94; *Ohio Bell Tel. Co.* v. *Public Utilities Comm.*, 301 U. S. 292, 302-303.[62]

A word is warranted with respect to the remarks of the respondents at the close of their respective hearings. Respondent Dodd was asked by Mr. Keefe, a member of the Committee, whether he had been "fairly and reasonably treated by this committee" and he replied in the affirmative (*Kerr Hearings, supra*, p. 157). Respondents Lovett and Watson made no protest to the Committee about its procedures. Yet these are simply the inevitable consequences of legislative justice—the accused do not antagonize their judges. The Committee did not, of course, act other than courteously to these respondents, and the hearings, except as to respondent Dodd, were within the scope of the procedure which the Committee evolved for itself. But certainly no waiver, or indeed no real evidentiary significance, can be attached to the failure of the respondents to protest. Circumstances made protests not only obviously unavailing, but wholly impossible.

Finally, the total inapplicability of legislative processes to the trial of individuals is revealed by the manner in which Congress, as a whole, acted upon the Kerr Committee findings. The original plan seems to have been for the Kerr Committee to serve as a "jury", and submit to Congress nothing but its summary report. See Rep. Keefe, *Cong. Rec.*, Vol. 89, p. 4600. *Cf. Morgan* v. *United States*, 298 U. S. 468, 480, 481. This, alone, was available to members of the House when they first voted on Section 304.

[62] There is no question that this evidence is part of the "record" in their cases. Rule 6 of the Committee provides specifically: "all reports of the several committees and the investigations made by the Federal Bureau of Investigation, together with such transcripts of evidence as are made available from the several investigating committees, and all letters, resolutions and other data bearing upon each individual case will be treated as a part of the evidence and record in each particular case."

since even the transcript of the testimony of the respondents, and the other material in *Kerr Hearings, supra*, were not printed until about June 30, 1943. See *Cong. Rec.*, Vol. 89, p. 7008. But even when Senate pressure forced the abandonment of this procedure, and this document was printed, the "record" thus prepared was wholly inadequate. In particular, it omitted *every bit of evidence* which the Kerr Committee had received *in favor* of the respondents (R. 21, 27, 30). Thus even a member of Congress who wished, in the very short time available between the printing of the *Kerr Hearings, supra*, and the final vote on the rider, to determine for himself the facts upon which he was being called to act, would have found the *Hearings* a biased and admittedly one-sided picture of the "record".

Again, it may be argued that a removal from a Government position, by the President for example, need not, to be constitutional, accord the one removed a hearing, or witnesses in his defense, or any other procedures whatever, and that consequently a legislative removal may likewise omit any such protection. The answer is the same as that which we have already made (pp. 141-142)—Section 304 is *not* a simple removal; it is the imposition of the drastic punishment of a permanent ban on gainful Federal employment. Certainly *such* punishment cannot be decreed by a judicial tribunal, as for treason, or by the Senate, as for high crimes and misdemeanors, without recognized safeguards. The same safeguards should be requisite when Congress undertakes to apply the same punishment.[63]

One can only conclude that Dean Pound's analysis of "legislative justice" is a statement of its inevitable characteristics. Legislative bodies cannot, consistently with

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[63] Compare the statement in President Johnson's veto of certain reconstruction legislation (Richardson, *Messages and Papers of the Presidents*, Vol. VI, p. 503), cited in *Duncan* v. *Kahanamoku*, Nos. 14, 15, October Term 1945: "We have no right to do in one place more than in another that which the Constitution says we shall not do at all."

fundamental principles, conduct inquisitions, decide guilt, and mete out punishment. When they attempt to do so, they necessarily subject their acts to comparison with those procedures which resulted in the universal denunciation of bills of attainder. What we are attempting to say was said over 150 years ago by Wooddeson in his *Law Lectures* (p. 643):

> All civil magistracies have in reason their appointed province. The legislative ought not to entrench on the judicial. Legislation, as it is the noblest exertion of human sovereignty, is the hardest task of human wisdom; and should not be perplexed by such temporary considerations or conjectures as might hazard impartiality of decision. Hence the political congruity of first enacting laws, and then inforcing them on subsequent occasions, and by different magistrates, has been confirmed by the very constant usage of the world • • •

We may also add the recent statement by this Court in *Duncan* v. *Kahanamoku*, Nos. 14, 15, October Term 1945:

> Courts and their procedural safeguards are indispensable to our system of government. They were set up by our founders to protect the liberties they valued. • • • They were opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws. Their philosophy has been the people's throughout our history. For that reason we have maintained legislatures chosen by their citizens or representatives and courts and juries to try those who violate legislative enactments. We have always been especially concerned about the potential evil of summary criminal trials and have guarded against them by provisions embodied in the Constitution itself.

We submit, that Section 304, both in its substantive features and in the manner in which it was enacted, and particularly in both combined, falls short of according to these respondents the guarantees of due process. The Section should be held unconstitutional on this basis alone.

## CONCLUSION.

Wherefore, Section 304 should be adjudged unconstitutional, and the judgments of the court below allowing recovery to each of the three respondents, should be affirmed.

Respectfully submitted,

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April, 1946.

## APPENDIX.

OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D. C.

March 8, 1943.

Honorable John H. Kerr,
House of Representatives,
Washington, D. C.

My dear Congressman Kerr:

Responding to your request of March 5, 1943, please be advised that the following organizations or groups of organizations have been regarded by this Department as subversive within the legislative mandate of Public Law 135 and Public Law 644, 77th Congress:

1. The Communist Party, U. S. A., and its affiliates.
2. The German-American Bund and its affiliates.
3. The Silver Shirt Legion of America.
4. Certain organizations found to be dominated by enemy governments or organizations. See "Confidential Memorandum to all United States Attorneys," February 2, 1942 (copy enclosed)

With respect to certain other organizations, not regarded as subversive within the meaning of the legislative mandate, it has been found that the evidence of subversive infiltration or control was such as clearly to require that they be brought within the scope of the investigation for administrative purposes. Such organizations, generally described as Communist, Fascist, or Nazi "fronts," have included the following:

1. American League Against War and Fascism (later known as American League for Peace and Democracy).
2. American Patriots, Inc.
3. American Peace Mobilization (later known as American People's Mobilization).
4. American Youth Congress and its affiliates.

5. League of American Writers.
6. National Committee for the Defense of Political Prisoners and National Committee for People's Rights.
7. National Federation for Constitutional Liberties and its affiliates.
8. Protestant War Veterans of the United States, Inc.
9. National Negro Congress and its affiliates.
10. Washington Committee for Democratic Action.
11. Washington Cooperative Bookshop, exclusive of mere patrons or subscribers.

Included also are certain organizations, mentioned in my opinion in the Bridges case (copy enclosed) or elsewhere as follows:

1. All-American Anti-Imperialist League.
2. International Labor Defense.
3. International Workers' Order.
4. Workers' Alliance.

Included also are certain more or less ephemeral organizations, infrequently mentioned in investigative reports, but with respect to which factual data has been made available to departments and agencies through the Interdepartmental Committee. See the Committee's Confidential Memorandum June 10, 1942 (copy enclosed).

The development of interpretations for the guidance of the Federal Bureau of Investigation during the fiscal year 1941-42 is well summarized in the Interdepartmental Committee's Report to me of June 30, 1942, included in my report to the Congress of September 1, 1942. See H. Doc. No. 833, 77th Congress, 2d Session, pp. 18-20.

I note that your request of March 5, 1943, is formulated to include "organizations found to be subversive . . . under any other law." Complete compliance with a request of such scope would of course require a careful review of the Department's prosecutive activities during recent years and would delay my response, presumably without supplying you with information pertinent to the work in which your sub-committee is engaged. For example, our prosecution of "Socialist Workers Party" leaders under the act

of June 28, 1940, in the District Court of the United States for the District of Minnesota, has been based upon evidence disclosing the revolutionary character of this "Trotskyist Group." No Federal employees have been reported as involved at any time, yet we regard the organization as subversive.

It occurs to me that it will be most helpful to you if I respond promptly as above, leaving for consideration in response to special request the occasional organization in which your sub-committee may become interested at some later date. Trusting that this procedure may be found satisfactory, and with assurance of our desire to cooperate,

Sincerely yours,

(Signed) FRANCIS BIDDLE,
*Attorney General.*